United States Court of Appeals

for the Second Circuit

APPENDIX

77-7217

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES COURT OF APPEALS
FILED
JUL 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

MAGNALEASING, INC.,
Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,
Defendants-Appellants.

JOINT APPENDIX

Volume III, pp. D-1 - D-184

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Defendants-Appellants
430 Park Avenue
New York, New York 10022
(212) 421-7200

KEANE & BUTLER
Attorneys for Plaintiff-Appellee
200 Park Avenue
New York, New York 10017
(212) 682-2247

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UNITED STATES DISTRICT COURT

D-1

SOUTHERN DISTRICT OF NEW YORK

----------x

MAGNALEASING, INC. :

Plaintiff, :

-against- :

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP., :

Defendants. :

----------x

United States Courthouse
~~Foley~~ Square
New York, N. Y. 10007

August 31, 1976
3:00 p.m.

Before:

HON. MARTIN D. JACOBS,

Special Master

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

MAGNALEASING, INC., :

Plaintiff, :

-against- :

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP., :

Defendants. :

----------x

Hearing before HON. MARTIN D. JACOBS, as Special Master, pursuant to Order of Hon. Lloyd F. McMahon, dated June 30, 1976, "...to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff," at the U. S. Courthouse, Foley Square, New York, N. Y. 10007, on August 31, 1976 at 3:00 p.m. Reported by William Blitz, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

Messrs. KEANE & BUTLER,
Attorneys for plaintiff,
200 Park Avenue,
New York, N. Y. 10017
BY: EDWARD F. BEANE, ESQ.,
Of Counsel

Messrs. MARSHALL, BRATTER, GREENE, ALLISON & TUCKER,
Attorneys for defendants,
430 Park Avenue,
New York, N. Y. 10022
BY: JAMES BERGER, ESQ.,
JEFFREY NEWMAN, ESQ.,
Of Counsel

---

* * * * * *

THE SPECIAL MASTER: Are we ready to proceed?

MR. BEANE: Yes, your Honor.

MR. BERGER: Before we proceed--

THE SPECIAL MASTER: Don't take this.

MR. BERGER: I want this on the record.

THE SPECIAL MASTER: Wait a minute. Let me make a statement first.

MR. BERGER: All right.

THE SPECIAL MASTER: By Order dated June 30, 1976, Judge McMahon has referred this action to me "As Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff."

I should also like to state that pursuant to my direction, the defendant has had certain pre-trial discovery as set forth in its letter to plaintiff's counsel dated July 29, 1976.

Proceed.

MR. BERGER: I want to state for the record an objection to this proceeding on the following grounds.

Mainly that this proceeding is unauthorized and that Judge McMahon had no authority to order this reference.

At page 275, line 7 of the transcript, the plaintiff in this case rested.

At page 289, line 20, the defendants

rested.

At page 289, line 22, the Court gave the opportunity to plaintiff for rebuttal and plaintiff said there would be none.

Up to that point, when the plaintiff rested and the defendants rested, and the plaintiff said that it wanted to put in no rebuttal case, the plaintiff had introduced virtually no evidence as to what the damages were that it had suffered.

There was brief testimony by Mr. Grenesko that the amount of the improvements to the property was approximately $107,000. That testimony, I believe, was at page 272.

Other than that, as the record now stands, it is devoid of any evidence on damages.

The Court recognized this at page 365, line 6, when it asked the plaintiff during the final argument on the last day of the three-day trial, March 24, 1976, if plaintiff had abandoned its damage claim.

The Court stated, and I would like to quote it for the record: "I don't recall

any evidence on damages at all."

Mr. Butler responded, "No, we haven't, your Honor. The damages which we put in were were we put on Mr. Grenesko to show what the improvements were to the store, and the other was just the difference between the price which is easily calculated."

The only problem with Mr. Butler's statement is that the day before he made this statement, the plaintiff rested and plaintiff rested without introducing any evidence as to what was paid in terms of rent, additional rent, taxes, common area charges during the time that the store was occupied at the Staten Island Mall.

Therefore, since there was no such evidence introduced into the record, there is no way to calculate the "difference" as Mr. Butler put it between what was paid and what was allegedly represented by the defendants to the plaintiff.

To further illustrate the fact that the record was devoid of any evidence, again during the final argument, on page 378, the Court

asked Mr. Butler, "Do you have any evidence on Item 2 in your wherefor clause?"

That is two small ii's in parenthesis of the wherefor clause which says and I quote from the amended complaint which is an exhibit, "Plaintiff be awarded the sum equal to the difference between what plaintiff agreed to pay as rent and additional rent and what plaintiff has paid to date of judgment."

Again, I must emphasize that there is nothing in this record to this date and prior to the time that plaintiff rested as to "what plaintiff has paid."

The Court went on again at page 378 and asked Mr. Butler, "You asked for the difference between what you paid and what you should have paid. I suppose that's what this amounts to."

"Mr. Butler: Right, your Honor.

"The Court: Where do you calculate it or am I supposed to look in a crystal ball?

"Mr. Butler: I thought it was something we could obviously work out. We have paid X number of dollars. That we know.

The only fair way to do it seems to me is that you take what we would have paid if the rate was $1.60"--I interrupt my quotation here because it is very important to note that Mr. Butler says we have paid X number of dollars. At that moment Mr. Butler did not know how much Magna-leasing or anybody else had paid, and as I stated before, the record is devoid of any evidence on that point.

The Court then continued on page 379: "Tell me what the arithmetic is. I have other things to do than your arithmetic. You would think I have a cast of thousands the way you come in here.

"Mr. Butler: Your Honor, we have estimated--Mr. Beane of my office has prepared the figures and the taxes approximately are $45,000."

Then there was a pause and the Court, "Please just give me the total sum."

"Mr. Butler: $55,000."

That is the state of the record as it presently stands with respect to damages.

I submit that since the plaintiff

rested, there is no authority to proceed or to have a reference on the question of damages, and there is absolutely no basis in the record for the Court's statement at page 14 of the memorandum opinion dated June 30, 1976, that "It appears that the issue of the amount of damages due to plaintiff is complex and will involve matters of accounting."

I don't know how the Court could have come to that conclusion, because there is nothing in the record for which the Court could even begin to think of what was involved in the damages.

THE SPECIAL MASTER: Mr. Berger, Is there any practical purpose in your laboring this further? Because let me state you have made your position clear for the record. As I have already pointed out, the matter has been referred to as Special Master to determine and report as to the amount of damages.

I might also call attention to the fact that the Court further said, "The issue of the amount of damages due to plaintiff is complex and will involve matters of accounting."

At any rate, I believe your statement is clear for the record. Certainly without expressing any views as to the merit of your position which is beyond my function, as Special Master, I don't see any purpose in laboring the matter any further.

MR. BERGER: Your Honor, I'm sorry. I don't think I was belaboring the point. I had finished my statement.

THE SPECIAL MASTER: I thought in essence you had.

MR. BEANE: Are you finished, Mr. Berger?

MR. BERGER: Yes. I just said I was.

MR. BEANE: Your Honor, may I just render a short reply to Mr. Berger's statement for the record.

First, I find it somewhat interesting that Mr. Berger chooses to raise the objection now as opposed to when Judge McMahon's order first came out.

But separate and apart from that I would like to just very quickly delve on each

of these three elements of damages, and as your Honor will see very soon if you have not already, that we're really talking about three elements of damage.

The record is not devoid of evidence. With respect to construction, Mr. Berger concedes that there is testimony as to construction costs by Mr. Grenesko, which was never controverted by Mr. Eisenberg who was the only witness that the defendant produced in this case.

With respect to common area charges and taxes, Mr. Berger overlooks his own joint statement of stipulated facts, and I refer to Paragraph 59 which says, "Pursuant to the terms of stipulation of settlement dated February 25, 1975, in a proceeding entitled "Staten Island Mall versus Magnaleasing, Inc., Civil Court of the City of New York, County of Richmond, Index No. 0003/75, Magnaleasing paid and continued to pay rent, additional rent due under the lease excluding the attorneys' fees claimed due as addtiional rent by reason of the legal proceedings."

It was stipulated here that we

paid each and every penny that was billed to us, and that was the rent that was paid. They know what it is and we know what it is.

THE SPECIAL MASTER: Did you say that was in a New York State Court proceeding?

MR. BEANE: Yes, but this was the joint stipulated statement of stipulation and disputed facts which was submitted to Judge McMahon and it is part of the official court record, and this particular paragraph is in that portion of this document which is a stipulated fact.

So there is no question about what we actually paid.

THE SPECIAL MASTER: Look again, I don't see any purpose in laboring it any further.

I would also like to say before concluding the matter that I had a pre-trial conference in this matter after the judge's memorandum order, that conference having been held on July 14, 1976, attended by counsel for both the plaintiff and the defendant, and there was no suggestion at that time before me that

there was any objection to my going forward as Special Master to determine and report as to damages.

MR. BERGER: Your Honor, I am not suggesting that you are not to proceed. I just want to get on the record for appeal purposes what our position is with respect to this proceeding. I don't think I had to bring it up any sooner. I couldn't go back to Judge McMahon after he had rendered his decision and moved to re-argue a point that had never come up during the trial.

THE SPECIAL MASTER: I don't want to engage in any controvery as to this matter. I simply want the record to be clear so that the rights of both parties will be preserved.

Suppose we proceed, gentlemen.

MR. BEANE: Your Honor, we served a series of subpoenas, the originals of which I have here--one affidavit of service I don't have as yet but the individual who served it will be here--on both Staten Island Mall and Feist & Feist for the purpose of getting down here before your Honor the records of Staten Island

Mall and their agent Feist & Feist with respect to payments made by Magnaleasing and by other parties, in particular a corporation called Regal Magnavox which was a subtenant of Magnaleasing, of rent and additional rent which consists of common area charges and taxes.

The purpose of that subpoena or those subpoenas was really to expedite this hearing in the sense of possibly agreeing upon what was actually paid which is a matter which should not be in dispute.

I have not received any such document and I don't know whether those documents are here in Court today.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Continue, Mr. Beane.

MR. BEANE: I would like to make a short opening statement with respect to the damages we intend to prove here today and the manner in which they will be computed.

As I am sure your Honor is aware,

Judge McMahon's decision found three basic misrepresentations.

One, with respect to the rate of leasing at the mall, one with respect to what the common area charges were going to be, and one with respect to what the taxes were going to be.

With respect to the level of leasing at the mall, Judge McMahon's decision found specifically, and I refer to page 3 that it was represented to Magnaleasing that as of December 4, 1972, the mall was 90 per cent leased and the mall was almost all rented.

With respect to common area charges, Judge McMahon found specifically that the mall falsely represented that all common area charges were estimated at 60 cents per square foot for the initial year and thereafter would be subject to normal increases due to inflation.

And with respect to taxes, Judge McMahon found that the mall had falsely represented--and I now refer to page 7 of Judge McMahon's decision--that for a fully assessed mall taxes

were estimated at $1.25 per square foot with the landlord paying the first 25 cents and thereafter taxes would be subject to normal increases.

As a result of those misrepresentations Magnaleasing suffered three categories of damages.

The first category has to do with its construction costs.

We created a store at that location, and Mr. Berger has already pointed out, spent approximately $107,000 to do so, and upon the rescision of the lease those construction items have no more value to us.

So, our computation of damages with respect to construction will be simply the original cost less a landlord's allowance to tenant which we received from the mall and which we credited against what we paid to construct the mall, and less the depreciation we took for a period of 30 months on those assets.

THE SPECIAL MASTER: Are you stating that the plaintiff received certain amounts from the subtenant?

MR. BEANE: No, certain amounts

from the mall. And we deducted that amount from our construction costs.

And when we reached a final figure, we added into that figure interest at the rate of 6 per cent per annum from the date of the loss, and that will be computed as part of our presentation.

THE SPECIAL MASTER: From which date?

MR. BEANE: We computed it on the final depreciated amount and we computed it as of the original date of completion of construction which is December of 1973.

With respect to common area charges, our damages are computed with respect to the initial lease year, and a lease year, your Honor, is from February 1st to the following January 31st. The first lease year was a partial year because we did not occupy the premises--

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: We will start with August of 1973. So the initial lease year is August 1973 through January 31, 1974.

For that period of time, your Honor, we used the figure which had been represented to us at 60 cents per square foot, using our total square footage which is 3608 square feet, and we subtracted that amount from the amount of common area charges Magnaleasing actually paid for that period, and the difference in our view is the excess that we should not have paid and would not have paid had the representations been true.

For subsequent lease years we added to the 60 cent figure in accordance with Judge McMahon's decision a factor of inflation of 10 per cent. That factor of inflation is, in fact, above the actual inflation for the period in time, and we will introduce as part of this hearing the actual Bureau of Labor statistics to sustain that.

What we did was simply add up the total of what we actually paid for subsequent years, subtract from that what we should have paid being measured by the 60 cent per square foot, plus the 10 per cent inflation factor for each year, and took the difference

as our excess payment.

With respect to real estate taxes, we used a similar computation, except in this respect: The New York City tax year runs from July 1st through June 30th. We used that year. And for the first tax year which we computed from August of 1973 through June 30, 1974, we computed what we should have paid on the basis of a $1 per square foot, which is what the mall falsely represented to us we would have to pay.

For subsequent tax years, we took what Judge McMahon labeled the normal increase, that being the increase in the tax rate, which increase was stipulated to in this joint statement of stipulated and disputed facts.

The two increases involved are 6.8 per cent for tax year July 1, 1974, through June 30, 1975, and 11.3 per cent for tax year July 1, 1975 through June 30, 1976.

THE SPECIAL MASTER: That second figure was a percentage over the actual taxes for the first year?

MR. BEANE: That's right.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: This measure of increase is the proper measure of increase because the assessment of the mall, once the mall became fully assed, never changed. It remained at the same figure from the minute it became fully assessed until today.

So that the only increase in taxes as a fully assessed mall occurred because of the increase in the New York City tax rate.

Those are the three elements of damage we intend to show to the Court.

MR. BERGER: Your Honor, I would just like to make a brief statement also.

THE SPECIAL MASTER: Surely.

MR. BERGER: We have a basic problem with the plaintiff's claim for damages. As Mr. Beane has stated, Magnaleasing, the plaintiff, seeks to recover moneys paid for improvements to the store, rent, additional rent, taxes and common area maintenance charges. There is just one problem with their claim.

Magnaleasing, the plaintiff, did not make any of the monetary payments that they

are seeking as damages. The money, all of the money that was ever paid to the Staten Island Mall with respect to this lease was paid by Magnavox, the parent company of Magnaleasing on Magnavox's checks drawn on Magnavox's bank account.

Magnaleasing, the entity that is seeking the damages, the plaintiff, did not have any bank account at any time, did not have any moneys of its own at any time. No checks were ever drawn on an account of Magnaleasing. No moneys were ever paid by Magnaleasing to the defendants or anyone else.

THE SPECIAL MASTER: I suppose Magnaleasing is a 100 per cent subsidiary of Magnavox.

MR. BERGER: Yes, your Honor.

Since it is a fact that Magnaleasing has not expended any moneys with respect to the leasing of the premises at the Staten Island Mall, it follows that it has not been damaged. Maybe someone may have been damaged. Assuming that we lost the appeal, which we intend to prosecute, and the defendants finding of fraud is affirmed

on appeal, maybe someone may have been damaged, but it certainly was not Magnaleasing, because Magnaleasing did not suffer any damage and didn't pay any money.

That is the only statement I have to make with respect to the damages.

I would like to make one more point. We were served with certain documents last night.

THE SPECIAL MASTER: You are referring to the subpoenas?

MR. BERGER: No. They produced certain documents to us last night at about 10:15. I have looked at the documents. They apparently are ledger sheets or some kind of internal bookkeeping records, and I don't know if they are Magnaleasing's or Magnavox's. I gather they are Magnaleasing's.

I don't understand them and I have not had an opportunity to either review them or sit down with an accountant of our choice and review them.

Therefore, I don't believe that we will be able to complete whatever cross

examination we might have today, completed to the extent that we feel necessary to protect our client's interest, or to put on any rebuttal with respect to the various amounts.

So I just wanted to make that clear at the outselt.

MR. BEANE: Your Honor, may I respond to that?

THE SPECIAL MASTER: All right.

MR. BEANE: The point that Mr. Berger is now raising at the level of a legal defense is a point which has incessantly been involved in the discovery in this action, and in various correspondence between us.

Magnaleasing made those payments. The fact that there isn't a Magnaleasing checkbook and that there isn't a Magnaleasing bank account is totally irrelevant. This whole issue is really what I would have to call a red herring for this reason.

Firstly, Magnaleasing is by stipulated facts a separate existing corporation. It has its own set of books and records, in which payments are entered as liabilities and

income is entered as credits or assets. Every single payment to which Mr.--

THE SPECIAL MASTER: Look, gentlemen, isn't this something that might more profitably be developed by proof?

MR. BEANE: Yes.

THE SPECIAL MASTER: Because you are both going into factual matters. I take it there will be some evidence bearing on this. You will both have an opportunity to brief it at the conclusion of the hearing.

MR. BEANE: I want to set the record straight on something else with respect to our service of certain documents on counsel for Staten Island Mall yesterday evening.

I received a call yesterday morning from Mr. Newman requesting certain additional documents, namely, the ledger and books of account of Magnaleasing.

I indicated to Mr. Newman that as soon as I have them in my hand I will provide them to him, which I did.

I look back on all the depositions that we took in this case, and in one of the

depositions, particularly Mr. Grenesko's deposition, Mr. Newman said to me on page 45 of the deposition, and I quote, "Mr. Beane, I am going to ask only a few more questions in this area and let it go at that and instead most likely put forth questioning in the form of a simple set of interrogatories rather than ask a witness to tell me what he doesn't know."

The series of questions that preceded this had to do with the very issue that is now being raised.

Then Mr. Newman said, "Is that acceptable to you?"

I responded, "The general concept of doing it by interrogatories is acceptable to me.

"Mr. Newman: That is all I am asking.

"Mr. Beane: Yes, it is most acceptable to me."

We were never served with any interrogatories.

This occurred on October 30th of 1975.

Your Honor, I also want to point out at this time since the issue has been raised at this time that if your Honor believes that it is a relevant issue on that, evidence should be taken on it, that the entire matter is moot for another reason.

I have in my possession and I am prepared to produce, if necessary, an assignment of any claim Magnavox has with respect to this lawsuit,damages to Magnaleasing.

As a matter of law--

THE SPECIAL MASTER: I am not expressing any view but would such an assignment if necessary be timely at the present time?

MR. BEANE: The assignment is timely, your Honor.

THE SPECIAL MASTER: Pardon?

MR. BEANE: The assignment is timely, your Honor.

THE SPECIAL MASTER: Perhaps you are right, perhaps you are wrong. In any event, that's a matter of legal argument.

MR. BEANE: That's a matter of law and legal argument.

The assignment is a matter of law, and I have case citations which I can read into the record--

THE SPECIAL MASTER: Just as I anticipated. It may be a matter of argument so I don't see any point--

MR. BEANE: There is this assignment and it has been made and we will introduce it into evidence.

THE SPECIAL MASTER: Continue with your proof, if you will.

MR. BEANE: I call Mr. Grenesko.

H E N R Y E. G R E N E S K O, called as a witness by the plaintiff, being first duly sworn by the Notary Public (William Blitz), testified as follows:

THE SPECIAL MASTER: How do you spell your name again?

THE WITNESS: G-r-e-n-e-s-k-o, Henry E.

DIRECT EXAMINATION

BY MR. BEANE:

Q Mr. Grenesko, by whom are you employed?

A The Magnavox Company.

Q For how long have you been employed by the Magnavox Company?

A Ten years.

Q In what capacities?

A I'm presently a marketing specialist and I was previously employed as the Magnaleasing coordinator.

Q For what period of time were you employed as a Magnaleasing coordinator?

A From August 1973 to approximately December 1974.

Q Will you describe briefly your job functions as Magnaleasing coordinator?

A It was my job to prepare pro forma statements for retail dealers of ours who were desirous of getting into regional mall locations.

And I was also responsible for supervising the payment of expenses with the malls.

Q Are you still involved in supervising payment of expenses in your present position?

A No.

Q At the time that you were Magnaleasing coordinator, did you oversee the payment of bills by Magnaleasing, including rent bills, tax bills,

construction bills and the like?

A Yes, I did.

Q Did you perform these functions commencing in August of 1973 until the time that you changed your job capacity?

A Yes, I did.

Q Do you still have any connection with overseeing bills with respect to Magnaleasing?

A Yes, I do.

Q Is it still basically the same function with respect to the overseeing of bills that you had as Magnaleasing coordinator?

A Yes, with the exception that there are no more construction costs.

Q Did Magnaleasing make certain improvements to the regional Magnavox store out at the Staten Island Mall?

A Yes, we did.

Q Would you tell us what the nature of those improvements were?

A Yes, they included such things as paneling, architectural services, carpeting, construction, fixtures, sign, lighting.

Q Did you make a computation as to the total

cost of all those construction improvements at the mall?

A I did.

MR. BEANE: Mark this for identification.

(Document entitled "Magnaleasing Leasehold Improvements," marked Plaintiff's Exhibit 1 for identification, as of this date.)

MR. BERGER: Your Honor, is this going to be a new Exhibit 1? We have exhibits in the main part of the case.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Let us start fresh, Plaintiff's Exhibit 1 and Defendants' Exhibit A.

MR. BERGER: All right. We have no objection.

THE SPECIAL MASTER: The document entitled "Magnaleasing Leasehold Improvements" will be received in evidence as Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 for identification, received in evidence, as of this date.)

BY MR. BEANE:

Q Mr. Grenesko, is Plaintiff's Exhibit 1 your computation of the total construction costs for the Staten Island Mall store?

A I'm sorry. Would you repeat that, please?

Q Does that document represent your computation?

A Yes, it does.

Q Can you tell me what the total cost of construction was in accordance with that document?

A $107,073.39.

MR. BEANE: Your Honor, I have and am prepared to introduce in evidence, if necessary, the actual invoices and checks corresponding to each one of those charges.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BERGER: I have no objection to not introducing the backup invoices and checks subject to correction later on, except I would like a stipulation from Mr. Beane that each one

of the checks were drawn on the account of Magnavox Company.

MR. BEANE: Your Honor, the checks speak for themselves.

MR. BERGER: They are not going to be in evidence.

THE SPECIAL MASTER: It will simplify that. If it is clearly the fact, why fuss over it?

MR. BEANE: Fine. I have no problem with that.

THE SPECIAL MASTER: All the checks are those of Magnavox.

MR. BEANE: They are all drawn on Magnavox's bank account. I will stipulate to that.

MR. BERGER: Can we just have it clarified as to the entire $107,073 that they were all drawn on Magnavox Company's account?

MR. BEANE: They were all drawn on Magnavox's checks.

THE SPECIAL MASTER: I believe that is clear.

MR. BEANE: For the record, I will

just indicate that these invoices are divided up by vendor, and each vendor corresponds to the vendor listed on Plaintiff's Exhibit 1 in evidence.

Can I, to simplify this--I will just pull out one--to illustrate to Mr. Newman and Mr. Berger--attached as part of these invoices and the checks we just referred to there is a voucher, and the voucher has a symbol, either a Z or a B, and the meaning of that symbol is important with respect to the issue raised by Mr. Berger.

Can we stipulate for the record that as to those invoices, and they are the majority of them that have vouchers, subject to verification by Mr. Berger, that there is a symbol denoted "Z" or "B" on these vouchers that are part of the invoices.

MR. BERGER: Yes, subject to checking.

Can we also stipulate that each one of the vouchers says on the top of it the Magnavox Company?

MR. BEANE: Yes, we can.

MR. BERGER: Can we also stipulate--

THE SPECIAL MASTER: Might I suggest maybe to simplify the matter, if one of the invoices might be received in evidence which is typical.

MR. BEANE: As typical? Fine.

THE SPECIAL MASTER: Wouldn't that serve all purposes?

MR. BERGER: That is fine.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: Your Honor, I would like to have this marked and introduced into evidence as Plaintiff's Exhibit 2 as a typical combination check, voucher and--

THE SPECIAL MASTER: You have already said it. Why repeat it.

Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: The invoice and attached check No. 088935 is being received in evidence as Plaintiff's Exhibit 2.

(Invoice and attached

check No. 688935, marked Plaintiff's Exhibit 2 in evidence, as of this date.)

MR. BERGER: Mr. Beane, can we also have stipulated that each one of the invoices from the various contractors or vendors indicates that the services or goods were sold to the Magnavox Company?

MR. BEANE: What I will stipulate to is that each of those invoices has the Magnavox Company either typed or printed on it. I will not characterize it.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q Mr. Grenesko, I show you a typical invoice that has been marked Plaintiff's Exhibit 2. If you will look on the voucher that is attached as part of that exhibit, you will see the symbol Z.

Would you tell me what that symbol means?

A Yes. It was later replaced by the Code B, both of which had the same significance.

That was my instructions, after reviewing the expense invoice that this was a legitimate

Magnaleasing expense and that Magnavox should release the amount of money stated on behalf of Magnaleasing, and that that amount should be charged to the Magnaleasing account.

Q Were those sums, in fact, charged to the Magnaleasing account?

A They were.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: Let me put into the record several paragraphs of the joint statement of stipulatedand disputed facts which describe Magnaleasing.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE. Let me offer a copy of the joint statement of stipulated and disputed facts as Plaintiff's Exhibit 3 in evidence.

THE SPECIAL MASTER. When is that dated?

MR. BEANE: That is dated, I think, March 22, 1976, the original of which is executed by both Keane & Butler and Marshall, Bratter,

Greene, Allison & Tucker.

THE SPECIAL MASTER: It will be received as Plaintiff's Exhibit 3.

MR. BERGER: No objection.

(Copy of joint statement of stipulated and disputed facts, marked Plaintiff's Exhibit 3 in evidence, as of this date.)

MR. BEANE: Paragraph 1 of Plaintiff's Exhibit 3 in evidence states that "Magnaleasing, Inc. is a Delaware corporation with its principal office in Indiana and is a wholly owned subsidiary of The Magnavox Company."

According to Paragraph 11, "Magnaleasing is the tenant of the Staten Island Mall having executed a lease with Staten Island Mall on or about April 26, 1973."

Paragraph 25, "Magnaleasing was incorporated to engage in the business of leasing various properties for use by The Magnavox Company for retail distributors, including the acquiring of Magnavox Home Entertainment Centers."

THE SPECIAL MASTER: Is it the only such leasing company?

MR. BEANE: This lease is not the

only lease that Magnaleasing executed.

I will eludicate that--

THE SPECIAL MASTER: That isn't my question. Is Magnaleasing the only leasing company of Magnavox?

MR. BEANE: Yes.

There are in addition a number of Home Center Entertainment stores that are owned by individual dealerships.

THE SPECIAL MASTER. What is their relationship to Magnavox? Simply a franchise or something?

MR. BEANE: Yes, in many cases.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q Mr. Grenesko, would you describe for the Court what Magnaleasing, Inc. is and what it does?

A Well, Magnaleasing, Inc. was established to assist retail dealers of The Magnavox Company obtain locations in regional malls, which they might not be able to do on their own because they lack the experience in negotiating leases with the developers, and in some cases because they are unable to secure leases on their

own with the developers without the backing of a more substantial organization.

Q With respect to that function, did Magnaleasing enter into leases with mall developers?

A We did.

Q How many leases did you enter into?

A Eight.

THE SPECIAL MASTER: Did you say eight?

THE WITNESS: Eight, yes.

Q Does that include the lease with the Staten Island Mall?

A It does.

Q Would you name the other malls that Magnaleasing entered into leases?

A First of all, of course, there was the Staten Island Mall in Staten Island.

The Bergen Mall in Paramus, New Jersey.

The Castleton Square Mall, Indianapolis, Indiana.

DeSoto Square Mall in Bradenton, Florida.

Town East Mall in Mesquite, Texas.

The South Glen Mall in Denver, Colorado.

The East Ridge Mall in San Jose, California.

Is that eight?

MR. BEANE: Your Honor--

MR. BERGER: No, it isn't.

THE WITNESS: There is one more, yes.

The Laurel Mall, in Hazelton, Pennsylvania.

MR. BEANE: Your Honor, can we stipulate that we have the actual leases here in Court if Mr. Berger wants to look at them? I don't know that they have any real meaning to this proceeding.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q With respect to the leases which you just denoted, did Magnaleasing pay rent at these malls?

A Do we pay rent?

Q Yes.

A Yes, we do.

Q Did Magnaleasing do construction at these malls?

A In some of them.

Q Which ones?

A We did construction in Staten Island, we did construction at the Laurel Mall, we did construction at the DeSoto Square Mall and the Town East Mall.

Q As a result of your entrance into the leases at these malls, did Magnaleasing receive income of some kind?

A We did.

Q What sort of income did you receive?

A We received income in the way of rent al, security deposits, lease guarantee payments.

Q Did you receive any income from landlords with respect to construction?

A Yes, we also received a landlord allowance where appropriate from the developer.

THE SPECIAL MASTER: When you sublet to your lessee, would Magnaleasing usually receive the same rental which Magnaleasing obligated itself to pay to the landlord?

THE WITNESS: Your Honor, in most cases the sublessee paid rent to the landlord himself directly.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.

THE SPECIAL MASTER: Was that true

with respect to the Staten Island Mall?

THE WITNESS: It was true up to a point, your Honor.

At one point, the sublessee because of a lack of business in the mall was unable to continue the full amount of the payment called for by the sublessee with us, and the primary lease we had with the Staten Island Mall, and therefore we negotiated with the tenant a lesser rate of rental.

He paid us directly and then we paid the full amount.

THE SPECIAL MASTER: You added the difference then?

THE WITNESS: No, your Honor. He paid us the amount of rent we agreed upon and we paid the full amount.

THE SPECIAL MASTER: That's what I am saying, the difference what Magnaleasing was obligated to do and what Magnaleasing received from the subtenant?

THE WITNESS: That's correct.

THE SPECIAL MASTER: Was that the typical arrangement with respect to the various

leases which Magnaleasing signed or was that peculiar to this situation?

THE WITNESS: That was peculiar to that situation.

THE SPECIAL MASTER: Let me ask you, in the course of a business where Magnavox had a dealer occupying a store, what would the arrangement be other than this situation where Magnaleasing took the lease?

THE WITNESS: In some instances, your Honor, if I understand you correctly, a regular franchised Magnavox dealer could sell our products in such a location as a mall without any lease obligation at all to Magnaleasing or Magnavox.

THE SPECIAL MASTER: You mean the franchisee as it were would make his own deal or lease with the landlord?

THE WITNESS: That's correct.

THE SPECIAL MASTER: And typically, does that take care of the majority of so-called popularly known Magnavox stores?

THE WITNESS: The vast majority of them, sir.

THE SPECIAL MASTER: In other words, you mentioned here eight that were leased to Magnaleasing. About how many other dealer or franchise stores are there, approximately?

THE WITNESS: Yes. We have approximately 70 of these Home Entertainment Centers who are doing business in regional malls.

BY MR. BEANE:

Q Mr. Grenesko, these payments that Magnaleasing received from various third parties, were they made in the form of checks drawn to Magnaleasing?

A Yes, they were.

MR. BEANE: Your Honor, to save time I would like to introduce as Plaintiff's Exhibit--

THE SPECIAL MASTER: Before you leave that, what would Magnaleasing do with those checks?

THE WITNESS: Those checks would be identified--received by me and identified as Magnaleasing checks, deposited with our bookkeeper, and those amounts of money credited to the Magnaleasing account.

THE SPECIAL MASTER: In whose bank

account would those checks be deposited?

THE WITNESS: The money itself would be primarily deposited in the Magnavox bank account.

MR. BEANE: Would you mark this for identification, please?

THE SPECIAL MASTER: Did Magnaleasing have any checking account of its own?

THE WITNESS: No, your Honor. There was no need for one.

THE SPECIAL MASTER: The answer to my question is no?

THE WITNESS: No.

(Group of invoices of Magnaleasing, Inc., marked Plaintiff's Exhibit 4 for identification, as of this date.)

BY MR. BEANE:

Q Mr. Grenesko, I hand you a seven-page document which I have had marked Plaintiff's Exhibit 4 for identification.

MR. BERGER: May I see it?

MR. BEANE: It is not in evidence yet. I will show it to you.

Q Would you examine that document and tell us

what it is?

A These are various Magnaleasing invoices that were billed to dealers who are in regional malls for various types of income received by Magnaleasing.

There is one for rental, there is one for amortization costs, there is one for a lease guarantee fee.

THE SPECIAL MASTER: Do they relate to the Staten Island Mall?

THE WITNESS: They do not.

MR. BERGER: Object to it, Your Honor.

THE SPECIAL MASTER: Why don't you make these things clear at the outset?

Off the record.

(Discussion off the record.)

MR. BEANE: Your Honor, they go to the issue of Magnaleasing, actually what Magnaleasing is, what it does, how it operates. It shows that it receives income.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q Mr. Grenesko, would you describe the method

in which Magnaleasing made rent payments and construction payments to the Staten Island Mall?

A I'm not sure if I understand your question. Can you be a little more explicit?

Q Let me rephrase it. When a rent payment is due--

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: You marked a series of documents as Plaintiff's Exhibit 4 and I move that they be received in evidence.

MR. BERGER: I object to them, your Honor. I don't think they are relevant.

MR. BEANE: Your Honor, they are relevant to the issue Mr. Berger is raising.

THE SPECIAL MASTER: Do I understand that these documents relate to property of a store other than that?

MR. BEANE: One of them relates to that store. There is one check here payable to Magnaleasing, Inc. from Regal--

THE SPECIAL MASTER: You may mark it for identification. I will exclude it from evidence especially in view of the fact that the

witness has been questioned as to the nature of the business and relationship between Magnaleasing and its subtenant, and furthermore, I have been told that the actual lease between Magnaleasing and the subtenant will be offered in evidence.

MR. BLANE: May we have a copy of that, please, since it was marked for identification?

Your Honor, may we go off the record?

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BLANE:

Q Is Magnaleasing still involved with Home Entertainment Centers?

A Magnaleasing is still providing a service to Home Entertainment Centers who want to get into regional malls which is assistance in negotiating a lease. We are no longer signing leases with developers or putting in construction into malls.

THE SPECIAL MASTER: In other words, you referred to eight leases, but currently you don't follow that practice?

THE WITNESS: That is correct.

THE SPECIAL MASTER: When was the

last of those eight leases made, about when?

THE WITNESS: About December of '74.

MR. BERGER: December 1974?

THE WITNESS: Yes.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Let the record note that the present lease is dated May of 1973.

MR. BEANE: So that this record be complete, why don't we introduce a copy of the lease.

THE SPECIAL MASTER: You mean the sublease?

MR. BEANE: No, I mean the lease. The lease between Magnaleasing and defendant.

(Lease between Magnaleasing and defendant, marked Plaintiff's Exhibit 5 for identification, as of this date.)

MR. BEANE: Do you have any objection to this being introduced into evidence?

MR. BERGER: Yes, I do, mainly because it looks like it is incomplete on its face. There is no cover page. I don't know

whether all the pages are there.

MR. BEANE. The original of this document is already in evidence. And I will stipulate that it is the original, the one that is in evidence at the trial. If this is incomplete--it is complete, your Honor, except for the cover page. It is the one in fact we used during all the depositions.

THE SPECIAL MASTER: All right, that lease will be received in evidence as Plaintiff's Exhibit 5.

(Plaintiff's Exhibit 5 for identification, received in evidence, as of this date.)

BY MR. BEANE:

Q Mr. Grenesko, with respect to the seven leases Magnaleasing executed, are they still in effect?

A Yes, they are.

Q Is Magnaleasing still conforming to the terms and conditions of those seven leases?

A They are.

MR. BEANE: Your Honor, I will introduce those seven leases for the purpose of establishing the duration of those leases to show the duration of Magnaleasing's

obligations under those leases.

MR. BERGER: Objection.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: I withdraw that.

BY MR. BEANE:

Q Mr. Grenesko, were the construction improvements which were added to the mall depreciated by Magnaleasing?

A Yes, they were.

Q Do you know the period of time over which they were being depreciated?

A They were depreciated over a 15-year term.

Q For how many months did Magnaleasing actually depreciate those improvements?

A 30 months.

Q When did they start depreciating them?

A In January 1974.

Q When did they cease depreciating them?

A June 30, 1976.

Q What was the reason for their ceasing to depreciate them?

A We learned of the Court having rescinded our lease with Feist & Feist.

MR. BERGER: Objection. There wasn't any lease--

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BERGER: May I have an objection on the record there wasn't any lease with Feist & Feist, your Honor?

THE WITNESS: Blackfriars Realty and Tottenham Realty.

MR. BEANE: Would you mark this document.

(Document headed "Leasehold Improvement-Damages," marked Plaintiff's Exhibit 6 for identification, as of this date.)

THE SPECIAL MASTER: Let there be received in evidence Plaintiff's Exhibit 6, schedule of leasehold improvements, less allowance from landlord and depreciation, plus interest.

(Plaintiff's Exhibit 6 for identification, received in evidence, as of this date.)

BY MR. BEANE:

Q Mr. Grenesko, excluding for the present time any factor of interest, what was the value of the

assets at the mall as of June 30, 1976?

A $83,184.

Q How did you derive that figure?

A We took the original cost of the construction and leasehold improvements of $107,073. We deducted from that the landlord allowance of $7252, which gave us a balance of $99,821.

And from that we also deducted depreciation for the period January '74 through December of '74 in the amount of $6655, through the period of January '75 to December '75, $6655 and the period January '76 through January '76, $3327, and that gave us the $83,184.

Q Did you add to that figure a component of interest?

A Yes, I did.

Q Can you tell me what interest rate you used in deriving your result?

A 6 per cent interest.

Q Can you tell me how you computed the interest?

A Yes. There is a backup document that goes with that.

MR. BLANE: Mark this.

(Handwritten document entitled "Leasehold Improvements - Interest," marked Plaintiff's Exhibit 6A for identification, as of this date,)

THE SPECIAL MASTER: Mark this Exhibit 6A.

(Plaintiff's Exhibit 6A for identification, received in evidence, as of this date.)

BY MR. BEANE:

Q Mr. Grenesko, does the document which has been marked Plaintiff's Exhibit 6A represent your computation of interest?

A It does.

Q Could you explain how you computed interest?

A Yes.

I began using a capital asset figure of $99,821, and that represented our original cost, less the landlord allowance.

I took off depreciation for the first year which was $6655, and that gave us a balance at the end of the year of $93,166.

And I totalled the balance at the beginning of the year and the end of the year and then divided

those two to get an average for the full year. And multiplied that times 6 per cent.

And I got an answer of $5790, which was the interest on the first period of January '74 through December of '74.

I used the same computation for the other two periods. Shall I go through those also?

Q Yes, please.

A Okay.

Through the period January '75 to December of '75 we started with a balance--depreciated balance of $93,166. During the year we depreciated $6655 more so that our terminating balance was $86,511.

I took the beginning balance and the ending balance, and added those, and divided by two to get an average balance for the year of $89,838.

I multiplied that times 6 per cent and received a figure of $5390, which was the interest in the second period.

And for the third period, January '76, I began with the figure of $86,511 which was the depreciated balance at that time, deducted $3327 depreciation for six months, came out with a figure of $83,174.

I totalled the beginning balance and

ending balance and divided by two to get an average balance for the six-month period of $84,847.

I multiplied that times six per cent and got a figure of $5091 and I multiplied that times 1/2 or 6/12 representing those six months, and received an answerof $2545.

The total of those three periods, $5790, $5390 and $2545 gave me the total interest of $13,725.

Q Is that the amount of interest which is added to the $83,000 figure to compute the damages Magnaleasing suffered with respect to construction costs?

A Yes, it is.

Q What is the total number?

A $96,909.

Q Mr. Grenesko, as part of your functions with respect to the Magnaleasing Home Entertainment Centers, did you oversee the payment of rent to--

THE SPECIAL MASTER: What happened to these improvements? Was there any salvage value?

THE WITNESS: They are still in the mall right now and nothing has been done with them.

MR. BEANE: Your Honor, we have another witness on that issue, the salvage matter.

THE SPECIAL MASTER: Proceed.

Q Mr. Grenesko, as part of your functions with respect to the operation of the Magnaleasing Home Entertainment Centers, did you oversee the payment of rents to the Staten Island Mall by Magnaleasing?

A Yes, I did.

Q Did Magnaleasing pay rents to the Staten Island Mall?

A Yes, we did.

Q Did those rent payments include payment for common area charges?

A Yes.

MR. BERGER: Your Honor, may I just have a continuing objection to the form of the question where Mr. Beane asks the witness did Magnaleasing pay, since that's--

THE SPECIAL MASTER: I think your position is clear.

MR. BEANE: Mr. Berger, since you made the objection, I would refer you to our own Paragraph 59 of the joint statement of

of stipulated facts where it says, and I quote, "Magnaleasing has paid and continued to pay rent and additional rent due under the lease, excluding attorneys' fees claimed due as additional rent by reason of legal proceedings."

As I said before, I really don't understand your objection.

Could you mark this?

(Document entitled "Common Area Charges, August, 1973 to January, 1974," marked Plaintiff's Exhibit 7 for identification as of this date.)

THE SPECIAL MASTER: The schedules entitled "Common Area Charges," August, 1973 to January, 1974 are being received as Plaintiff's Exhibit 7.

(Plaintiff's Exhibit 7 for identification, received in evidence, as of this date.)

MR. BERGER: Your Honor, I don't mean to be jumping up, but just to protect the record, this Exhibit 7 illustrates so clearly my point that none of this was introduced before, that I would like to just have an objection on the record.

THE SPECIAL MASTER: This goes back to your comments at the outset.

MR. BERGER: Yes, this illustrates it 100 per cent.

THE SPECIAL MASTER: I get your point. It is beyond my function.

BY MR. BEANE:

Q Mr. Grenesko, will you identify this schedule?

A Yes, this is a summary of common area charges that were paid from August 1973 through July 1976 to Staten Island Mall.

Q On each of the pages of this schedule, there is a column labeled "Magnaleasing Paid."

Will you tell the Court how you derive the numbers that appear in that column throughout this schedule?

A Those numbers were taken from Magnaleasing records which included vouchers and checks.

MR. BEANE: Your Honor, I have the vouchers and checks here. Rather than clutter up the record by introducing them all into evidence, I would make them available to Mr. Berger, and subject to correction of any

mathematical error that may have been made to compute the total amount of common area charges actually paid to the mall.

I have the checks, I have the vouchers. What I would like to do is something that we did with respect to the construction documents, introduce a typical--

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Let me simply make a broad statement for the record then.

Referring to Plaintiff's Exhibit 7, the parties stipulate that subject to check the amounts set forth as having been paid are correct.

Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q During the period from August 1973 to January 1974, how much common area charges were paid to The Mall?

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q During the period from August 1973 to

January 1974, did you perform a separate computation with respect to common area charges at the mall?

A Yes, I did.

Q Is that the computation that appears in the column labled "Magnaleasing Should Have Paid"?

A Yes, it is.

Q Would you tell us how you did this computation?

A The $1804.02 figure represents the common area charges from the period August '73 to January '74, based on a 60 cent per square foot cost on 3608 square feet.

Q Where was the number 3608 derived?

A That was obtained from the main lease, which included the rent, the annual rent that we are to pay at that location and derived by the $6.50 per square foot which also appears in the lease.

Q Would you turn to the second page of this schedule? Did you do a separate computation with respect to common area charges for the period from February 1, 1974 to January 31, 1975?

A I did.

Q What per square foot figure did you use to do that computation?

A 66 cents per square foot.

Q How did you derive that figure?

A That is a 10 per cent rate of inflation factor on top of the 60 cents we would have paid ordinarily.

Q The numbers that appear in that column were all derived by doing the mathematical computations based on that 66 cents per square foot?

A That is correct.

MR. BERGER: Your Honor, I would just like to state an objection for the record that there is no basis--

THE SPECIAL MASTER: As I understand you took the 10 per cent so-called inflation figure for each tax year after the first year?

THE WITNESS: That is correct, your Honor.

MR. BERGER: I would just like to state that there is no basis in the record for using that 10 per cent figure.

Q Would you turn to the next page of the schedule which covers the year February 1, 1975 through January 31, 1976? What per square foot figure did you use to do the computation in the column labeled

"Should Have Paid"?

A 72 cents a square foot.

Q How did you derive that figure?

A That represents a 20 per cent inflation rate factor over the 60 cents base year figure.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BERGER: Same objection, your Honor.

Q Turn to the last page of the schedule. That covers a period from February 1, 1976 to June 30, 1976, plus July 1976.

Let us first take the period ending June 30, 1976.

What per square foot figure did you use to compute the number denoted "Should Have Paid"?

A That was 78 cents a square foot.

Q How did you derive that figure?

A That was a 30 per cent rate of inflation factor over the 60 cent base year figure.

MR. BERGER: Same objection.

Q With respect to the July 1976 payment, what figure did you use to denote the column "Should Have Paid"?

Let me rephrase it.

Did Magnaleasing pay rent in July, 1976?

A Yes, we did.

Q The amount that Magnaleasing paid is stated in that schedule, is it not?

A Yes, it is.

Q What is the claim of Magnaleasing with respect to the amount paid in July, 1976?

A We claim that since the lease was rescinded in June that the entire amount paid for common area charges in July should be refunded.

MR. BEANE: Your Honor, since Mr. Berger raised an objection concerning the use of the 10 per cent inflation factor, I would ask that the Court take judicial notice--

THE SPECIAL MASTER: Judicial notice of what?

MR. BEANE: --that the Consumer Price Index as compiled by the Bureau of Labor Statistics for the calendar years in question are as follows:

The calendar year 1974 over 1973, the Consumer Price Index for the New York metropolitan area was 10.8 per cent.

MR. BERGER: Your Honor, the basis for my objection is that there is no basis in the record for using any inflationary figure, whether it is 10 per cent of 5 per cent.

THE SPECIAL MASTER: Let me ask you this: What particularly and factually are the items or elements that make up this common area charge?

MR. BEANE: The actual operating expenses at the mall.

THE SPECIAL MASTER: Getting away from abstracts, particularly what?

MR. BEANE: Cleaning, electricity for the mall area.

Q What else?

A Snow removal.

MR. BEANE: Snow removal. I guess promotional things to a certain extent. All the expenses that are necessary to operate The Mall as a going concern.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Continue.

MR. BEANE: I think I was at the point where the calendar year of 1975 over 1974, the Consumer Price Index was 7.6 per cent, and the figure for July '76 over July 1975, it was 6.1 per cent.

Thus when you add up all the increases you come up with a total of 24.5 per cent.

For that period we used an inflationary rate of 30 per cent.

If the Court desires, I have the publications of the U. S. Department of Labor, Bureau of Statistics, which sets forth these figures.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Proceed.

BY MR. BEANE:

Q Mr. Grenesko, when you totalled up all of the payments that Magnaleasing paid to The Mall and subtracted from that your computations of what Magnaleasing would have paid for the various lease year periods what total difference did you compute?

A The difference for the period August 1973 through July 1976 is $16,888.74.

Q Is that the figure that Magnaleasing is claiming that it paid in excess of what it should have paid for common area charges?

A That is correct.

MR. BERGER: Your Honor, may I just see the exhibit so I can conform it to my copy?

MR. BEANE: Yes.

Q Mr. Grenesko, did you compute interest on that amount?

A Yes, I did.

Q Can you tell me what rate of interest you used?

A 6 per cent.

Q Can you tell me how you computed it?

A I have a document which covers my computations.

THE SPECIAL MASTER: What is the total interest charge?

MR. BEANE: Mark it.

(Document headed "Common Area," marked Plaintiff's Exhibit 7A for identification, as of this date.)

THE SPECIAL MASTER: It will be

received.

(Plaintiff's Exhibit 7A for identification, received in evidence, as of this date.)

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: Mark this, please.

(Document headed "Taxes, August, 1973 to June 30, 1974," marked Plaintiff's Exhibit 8 for identification as of this date.)

MR. BEANE: I would have this marked as Plaintiff's Exhibit 8.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: Your Honor, we placed our claim for damages for taxes and for common area charges on moneys that we paid that we were never reimbursed for. There are no charges included on those schedules.

THE SPECIAL MASTER: I am not saying you are not correct, but that should be demonstrated. You say for some period of time you did say the subtenant did pay something on account of that.

What I would like to see is a simple clean schedule.

First of all, was the subtenant obligated to pay for additional taxes or additional area charges where you were?

MR. BEANE: Yes.

THE SPECIAL MASTER: The provision was the same.

MR. BEANE: YEs.

THE SPECIAL MASTER: All right.

I would like to see a simple schedule showing what he actually did pay so that then there would be a net schedule as it were showing what you paid with a credit with what you received from the subtenant.

MR. BEANE: Your Honor, as Mr. Grenesko testified before, the subtenant paid directly to The Mall and did not pay tous. So that our records only reflect what we paid. We have copies of vouchers--he paid directly to The Mall, not to us.

THE SPECIAL MASTER: You mean that was true of additional taxes?

MR. BEANE: That is correct.

Then we started to get billed that portion of the additional taxes that were not

paid and that portion of common area charges that were not paid.

THE SPECIAL MASTER: In other words, you paid the difference, the differential between what The Mall charged and what the subtenant paid?

MR. BEANE: That is correct.

THE SPECIAL MASTER: Is that correct, Mr. Berger?

MR. BERGER: I assume it is.

THE SPECIAL MASTER: All right. let the record be clear.

It is agreed that with respect to charges for tax, rent or common area rent, for the period the subtenant made such charges directly to The Mall, and the amounts being claimed by the plaintiff are for payments made directly by plaintiff or Magnavox, which payments were made directly to The Mall and which were not reimbursed by the subtenant to plaintiff or Magnavox.

MR. NEWMAN: We can't speak to what was reimbursed obviously between the subtenant and Magnavox. We can speak to what the

subtenant paid us.

THE SPECIAL MASTER: At least I put that in terms of his claim.

MR. NEWMAN: Yes.

THE SPECIAL MASTER: In other words, you are not precluded from showing if such be the fact that there were other payments made by plaintiff or Magnavox for which it may have been reimbursed by the subtenant.

Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q Mr. Grenesko, with respect to the moneys being claimed as damages for excess common area charge payments. was any portion of those moneys eimbursed to Magnaleasing or Magnavox by the subtenant?

A No, they were not.

Q By any other source?

A No.

Q Will you identify now what Plaintiff's Exhibit 8 is?

A This is a summary of taxes for the period August 1973 through July 1976. They were paid under our lease at the Staten Island Mall.

Q In the columns on each of these pages which is labeled "Magnaleasing Paid" or "Actually Paid," what do those numbers represent?

A The column "Magnaleasing Paid" represents numbers that were derived from checks and vouchers out of the books and records of Magnaleasing.

Q Were you reimbursed for any portion of any of that sum?

A No, we were not.

Q For the entire period in question, August of 1973, to July of 1976, how much did Magnaleasing pay The Mall for real estate taxes?

A We don't have that figure.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q Would you turn to the first page of that schedule? Did you make another computation for common area charges--for taxes on that page?

A Yes, we did.

Q Is that the computation that is included in the column labeled "Should Have Paid"?

A It is.

Q What figure did you use to make that computation?

A We used $1 a square foot figure.

Q Turning to the next tax year which is July 1974, through June of 1975, what per square foot figure did you use to compute the "Should Have Paid" column?

A We used the $1.07 per square foot.

Q Where did you derive that figure from?

A That was the original $1 a square foot that we had at the beginning plus a 6.8 per cent increase in New York State tax rate.

MR. BERGER: Your Honor, I am going to object to the exhibit. I mean, they have the columns reversed with the wrong figures. Instead of under--

MR. BEANE: No, we have not. The columns are right. The numbers are right.

MR. BERGER: I don't understand how you should have paid--

MR. BEANE: More than we actually did pay?

MR. BERGER: Yes.

MR. BEANE: Because that was a period in which the subtenant paid most of the taxes and we did not take the pro rata share.

We just used the whole figure for what we should have paid. Those numbers are right. Those are all we paid for that period.

MR. BERGER: That is the most confusing thing I ever did see.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BERGER: I would like to object to that because there is nothing in the record to allow them to use that method of calculating what the taxes should have been. There is nothing in the record to support them using the tax rate.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Do I correctly understand, Mr. Beane, that in determining your damage, you started with the represented or misrepresented tax estimate of $1, and in order to take care of the "normal increase," you took as an increase to that $1 the percentage increase of the actual taxes for one year compared with later years?

MR. BEANE: With this modification.

What we did for each subsequent lease year, and there are two of them, we took the actual percentage tax increase starting with the year in which the taxes were $1, and added that figure to the $1 figure, and then computed on the basis of that figure.

For example, on the second sheet--

THE SPECIAL MASTER: How does that differ from what I said?

MR. BEANE: Only to the extent of we did it year by year and we did it tax rate increase by tax rate increase.

THE SPECIAL MASTER: Exactly. That's what I would assume.

In other words, if for example, after the first year the tax rate increased, say, from 10 per cent to 11 per cent, you would have added to the represented or misrepresented tax an increase percentage of 1 over 10 or 10 per cent, correct?

MR. BEANE: Yes.

But we didn't even have to do that, because the increase in the tax rates are stipulated to. They are in evidence. So I

used the figures that are in evidence.

In other words, there is no disagreement as to what the--

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: In the joint stipulation of facts, the tax rate increases are stipulated.

MR. BERGER: The one problem with this is that there is no evidence to support using normal increase as the standard in this record.

THE SPECIAL MASTER: I realize your point, but I am frank to say that certainly for the present I am disposed to find that a "normal increase" would be the percentage in the actual tax rate.

MR. BERGER: I want to make my objection clear. There is nothing in the record during the trial to indicate that a normal increase, and I'm using normal increase in quotes, is what should be used, and for how long that $1 was supposed to apply.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: So the record is clear, our position is Judge McMahon's finding as to what the misrepresentation was defines what a normal increase is, just like it does in the common area charges.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: If your Honor will take judicial notice of the fact that the tax assessment at the mall on a fully assessed mall has not increased, it is unnecessary to introduce these documents.

I am introducing them solely for the purpose of having your Honor take judicial notice of that fact.

THE SPECIAL MASTER: Is that the fact, that the actual dollar assessment has not changed or increased?

MR. BERGER: Yes, and it is also the fact that there are certiorari proceedings--

THE SPECIAL MASTER: All right, I need not take judicial notice of it since counsel concedes it.

MR. BEANE: All right, then it is

unnecessary for me to use these documents.

MR. BERGER: Has not increased since when? That is a good point.

MR. BEANE: Since March of 1974 which is something that was in the trial record which is the date that The Mall was assessed as a fully assessed mall.

That figure is $24 million and it stayed $24 million.

MR. BERGER: Subject to the certiorari proceedings our clients brought.

MR. BEANE: There is no decision reducing the taxes, Mr. Berger. When and if there is, then maybe your argument might have some merit. I am just stating what is, not what might happen.

BY MR. BEANE:

Q Mr. Grenesko, what was the total difference between taxes that Magnaleasing actually paid and the taxes computed by taking into account the $1 per square foot for the first year and a square foot figure representing the increase in the tax rate for subsequent years?

A Through the period July '74 to June '75,

the difference amounted to $14,191.41.

THE SPECIAL MASTER: That is just for the first year?

THE WITNESS: Yes, your Honor.

THE SPECIAL MASTER: What is the figure for the aggregate?

MR. BLANE: He has the total.

Q What is the total figure, Mr. Grenesko, the total difference?

A The total for the entire period is $34,725.96.

THE SPECIAL MASTER: Does that include interest?

THE WITNESS: It does not, your Honor.

Q Is that the amount that Magnaleasing claims it paid in excess of the charges as were represented exclusive of interest?

A Yes, it is.

Q What is the total interest that you computed with respect to that figure?

A I have a document which covers that.

THE SPECIAL MASTER: Call that Exhibit 8A then.

(Document headed "Taxes," marked Plaintiff's Exhibit 8A in evidence, as of this date.)

THE WITNESS: Will you repeat the question, please?

(Read question.)

THE WITNESS: The total interest is $1964.01. That covers the period August '73 through July '76.

Q When you add that interest figure to the amount of excess payment of taxes, what is the total of that figure?

A The sum total is $36,689.94.

Q What interest rate did you use in computing the interest?

A 6 per cent simple interest.

Q Are your computations set forth in this document that is marked Plaintiff's Exhibit 8A?

A They are.

MR. BEANE: I have no further questions of Mr. Grenesko.

THE SPECIAL MASTER: You may question, Mr. Berger.

MR. BERGER: Mark this, please, as Defendants' Exhibit A.

(Document dated August 18, 1976 to Jeffrey Newman from Keane & Butler, marked Defendants' Exhibit A for identification, as of this date.)

MR. BERGER: Mr. Grenesko, I show you a document that we marked as Defendants' Exhibit A which is a letter dated August 18, 1976, from Keane & Butler to Marshall, Bratter, and I would ask Mr. Beane to stipulate that an officer of Magnaleasing, Mr. Hafner, verified the contents of this letter.

MR. BEANE: Do you have the certification?

MR. BERGER: I don't have a copy of the certification with me.

MR. BEANE: Yes, I have it. I will so stipulate.

MR. BERGER: We'll have to annex the certification, your Honor, as the exhibit.

THE SPECIAL MASTER: This will be received in evidence as Defendants' Exhibit A.

(Defendants' Exhibit A for identification, received in evidence, as of this date.)

CROSS EXAMINATION

BY MR. BERGER:

Q Mr. Grenesko, referring you to page 4 of Defendants' Exhibit A, can you explain why the damage calculation of $34,726.06 is different from the total that you arrived at on Plaintiff's Exhibit 8A which is $34,725.93?

A No. Since this letter has no backup documents showing how this figure was arrived at I can't explain the difference.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q Looking at the Exhibit 6A, can you tell us why you totalled the figures and then divided by 2 when you were dealing with the depreciation?

A Yes, I can explain that.

Since the--let me get that document.

Q Exhibit 6A.

A What I attempted to arrive at was an average balance for that particular time period, January through December of '74 on which to compute interest, and I did that by taking the value of the fixtures and leasehold improvements at the beginning of the year, the value at the end of the year after depreciation, totalling those two and dividing by 2 to arrive at an average balance.

Q Why did you feel you had to arrive at an average balance?

A Because the depreciation took effect on a month-by-month basis and that capital asset figure changed on a monthly basis.

Q Why did you begin calculating depreciation as of January 1974, rather than August 1973?

A Because that's when our books of record shows depreciation was first taken.

I might add to that, The Mall--our mall location was not completely fixtured at that time, in August of 1973.

Q Mr. Grenesko, you testified that the depreciation was calculated over a ten-year period, is that correct? A fifteen-year period?

A A fifteen-year period is correct, that's right.

Q I refer you to your trial testimony at page 272. You were asked the question by Mr. Butler, "What is your factor for depreciation?

"A Of the life of the fixture?

"Q Yes.

"A Ten years."

Can you explain why you are testifying

now it was 15 years and at the trial you testified that it was 10 years?

A Yes, I can explain that.

At that particular time, I understood the life of the fixtures to be depreciated over a 10-year period. When I went back to Fort Wayne I did check the books of records, checked the accountant that keeps those records and I determined that they were using a 15-year life period for them.

That was an accountant's decision.

Q Why did Magnaleasing stop signing leases with developers and constructing the stores in the malls?

MR. BEANE: Objection.

THE SPECIAL MASTER: I will allow it. Answer the question.

A One of the reasons was that we felt that we had obtained a background of knowledge from our involvement in getting into regional malls so that we could use this in assisting other dealers who wanted to get in on their own.

Our second reason was that we didn't want to spend any more capital funds in this particular project.

Q When you say "we," you mean Magnavox

didn't want to?

A Magnavox, yes.

Q Is Magnaleasing still in existence as a corporation?

A Yes, it is.

THE SPECIAL MASTER: Does Magnaleasing perform any services or have any functions other than leasing properties as it did in the past?

THE WITNESS: It does not.

THE SPECIAL MASTER: It does not perform any other functions?

THE WITNESS: No other function, right.

Q It does not even lease property any more, does it?

A Not any more, no, it doesn't.

THE SPECIAL MASTER: But it is still the tenant under certain leases that were made in the past?

THE WITNESS: That is correct.

Q You testified that Magnaleasing ceased doing this type of business in December of 1974?

A I said I believe that is the closest date

I can recall we signed our last lease in a regional mall.

Q Let me refer you to your deposition in this case which was taken on October 30, 1975, page 29 where you testified that Magnaleasing ceased performing these functions in February of 1974. Do you recall that testimony?

A I don't recall that specific date, no.

Q Let me just read it. Referring to page 23 of your deposition:

"Q Did there come a time when these modes of assistance were no longer rendered by Magnaleasing?

"A Yes.

"Q When was that time?

"A I can't give you an exact time.

"Q Approximately.

"A February or March of 1974. More likely March.

"Q Was this a decision within Magnaleasing to abandon these forms of assistance?

"A Yes."

Does that refresh your recollection that it was February or March of '74 rather than December?

A It does not, but perhaps I can give you

the exact answer because in my briefcase I do have the original leases that we guaranteed. I believe I have all of them. And I may have the last one that was signed and I may be able to state the last date we terminated that type of business.

Q I am just trying to find out whether it was February of '74 or December of '74.

A I can't recall.

Q In response to some questions from his Honor, you did say that Magnaleasing does not have and has never had its own bank account?

A That is correct.

Q So that any payments that were made with respect to the Staten Island Mall were made by Magnavox, isn't that correct?

MR. BEANE: I object to the form of the question.

THE SPECIAL MASTER: I will allow it. Answer the question.

A The payments--the payments were authorized by Magnaleasing and made on a Magnavox check.

Q From a Magnavox bank account?

A That is correct.

Q Magnavox was the drawer of all such checks?

A That is correct.

THE SPECIAL MASTER: Let me ask you, does Magnaleasing ever get up a financial statement or balance sheet of its own?

THE WITNESS: We do, your Honor, on a monthly basis.

THE SPECIAL MASTER: Would you say that Magnaleasing regards itself as a division or branch of Magnavox?

THE WITNESS: Yes, I do, your Honor.

THE SPECIAL MASTER: In essence isn't that what it really is?

THE WITNESS: It really is a division of Magnavox. In the same way we have other divisions.

THE SPECIAL MASTER: Its activities are limited to the leasing of properties?

THE WITNESS: That is correct, your Honor.

THE SPECIAL MASTER: For the benefit of Magnavox dealers?

THE WITNESS: That is correct, your Honor.

Q Is it true that the only money that

Magnaleasing had was money that was set aside by Magnavox for Magnaleasing?

MR. BEANE: Objection as to form, your Honor. The question is not answerable in that form.

Mr. Grenesko has in fact testified that that is not the case.

THE SPECIAL MASTER: I don't see what harm--

MR. BERGER: This is cross examination.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: Read his question again.

(The question was read.)

THE SPECIAL MASTER: Answer the question. It does not add anything to what has already been said.

A No, because Magnaleasing received payments from dealers. So they would have received income in that direction.

MR. BERGER: That was not the question I asked at all.

THE WITNESS: I believe it is.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: When Magnaleasing would receive payment from a dealer, what would it do with that payment?

THE WITNESS: Magnaleasing would signify that this was Magnaleasing money. It would be deposited into a Magnavox account.

THE SPECIAL MASTER: It would be turned over to Magnavox?

THE WITNESS: That's right.

MR. BERGER: I still don't think I got an answer to my question. Can you go back and read the question, please?

(The question was read.)

THE WITNESS: If you're saying if it's true that the only money Magnavox ever had was the money set aside by Magnaleasing, I have to say no, because Magnaleasing did receive money from another source.

BY MR. BERGER:

Q Has Magnaleasing ever been called upon by Magnavox to repay any of the amounts that were set aside

and advanced for Magnaleasing by Magnavox?

A No.

Q Are you aware of any intention by Magnaleasing, either presently or at any time to repay any of the amounts that were advanced by Magnavix?

A I'm not aware of any.

Q You never had any discussions with anybody within Magnavox or Magnaleasing on that subject?

A I never have.

THE SPECIAL MASTER: Formally, isn't Magnaleasing, in fact, indebted to Magnavox?

THE WITNESS: Yes.

Q What is the basis of that indebtedness?

A The basis of the indebtedness is the money that was set aside by Magnavox for Magnaleasing and the obligation that exists by Magnaleasing to Magnavox for that money.

Q Is that an obligation that is evident by any note or any document?

A It's evident by a balance sheet that's drawn up.

Q In fact, is that obligation ever going to be lived up to by Magnaleasing?

MR. BEANE: Objection. He can't answer that. He is asking him to speculate.

THE SPECIAL MASTER: While it is argumentative I will allow it. I think the significance is clear. If it is a subsidiary what difference does it make?

MR. BERGER: I think it makes a big difference, your Honor. Because we all know they are never going to repay that money and therefore they have not been damaged. That's the point.

MR. BEANE: Mr. Berger is now testifying.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BERGER:

Q Would you be able to make an estimate, Mr. Grenesko, of what the percentage was of income that Maganleasing received from other dealers of the total moneys that Magnaleasing had? I am talking about including the money from Magnavox. Doyou understand the question?

A No, I don't.

Q You have $100,000, say, that Magnaleasing

has set asid . You said that some portion of the money that Magnaleasing had over a period of time came from dealers. I believe you testified that there were rentals, security deposits, lease guarantee payments.

What percentage of the moneys that Magnaleasing had, the total moneys was represented by security deposits, lease guarantee payment?

A I can only give you a guess, if you want a guess.

THE SPECIAL MASTER: Give me your best estimate.

Q Your best estimate.

A Five per cent.

Q So that by and large, the large bulk of the money that Magnaleasing had came from Magnavox?

A That is correct.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BERGER: Mark this, please.

(Request for check voucher, marked Defendants' Exhibit B for identification, as of this date.)

BY MR. BERGER:

Q Mr. Grenesko, I show you a document that has been marked Defendants' Exhibit B and ask you if you

can identify that document for the record. It is a copy of a document.

A Yes, I can identify it.

Q Can you identify it for the record, please?

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: I object. For what purpose is he offering it?

THE SPECIAL MASTER: It may bear on the relationship between Magnavox and Magnaleasing.

That will be received as Defendants' Exhibit B.

(Defendants' Exhibit B for identification, received in evidence, as of this date.)

BY MR. BERGER:

Q Mr. Grenesko, can you explain the number on the check and that same number also appears on the request for check, the second page, 5436201?

A No, that is not my writing. I cannot explain that number.

Q Do you know what the number is that appears, No. 309303?

A No, I have no idea what that number is.

Q Is there such a thing as a vendor number

within Magnavox Company?

A Yes, there is.

Q What does that signify?

A It's conceivable that could be a vendor number. I'm not really sure. It just signifies that there are certain vendors that we do business with on a regular basis and they are assigned numbers for record maintenance purposes. And most likely that's what that is.

MR. BERGER: I have no further questions at this time, your Honor.

THE SPECIAL MASTER: Are we through with this witness?

MR. BEANE: I have no further questions.

THE SPECIAL MASTER: All right, you are excused, Mr. Grenesko.

Off the record.

(Discussion off the record.)

MR. BEANE: I call Mr. Samuel J. Rozel.

S A M U E L J. R O Z E L, called as a witness by the plaintiff, being first duly sworn by the Notary Public (William Blitz), testified as follows:

THE SPECIAL MASTER: What is your full name?

THE WITNESS: Samuel J. Rozel, R-o-z-e-l.

DIRECT EXAMINATION

BY MR. BEANE:

Q Mr. Rozel, by whom are you employed?

A I'm employed by the Magnavox Company.

Q In what capacity?

A I'm an officer of Magnavox Company and various of its operating other subsidiaries.

Q What office do you hold in the Magnavox Company?

A Vice president, general counsel and secretary.

Q Do you hold any salaried position other than officer? Is general counsel an officer position?

A No, not as such. The officer position is vice president and secretary.

MR. BEANE: I would like to have this document marked in evidence.

THE SPECIAL MASTER: This will be received as Plaintiff's Exhibit 9 in evidence.

(Document entitled "Assignment," marked Plaintiff's Exhibit 9 in evidence, as of this date.)

MR. BERGER: Your Honor, I am going to object to this.

THE SPECIAL MASTER: I understand and I am receiving it in evidence so that we may have a complete record. I am certainly not expressing any view on whether this assignment was timely so as to establish any right on behalf of Magnaleasing.

MR. BERGER: I would like to note for the record that March 22, 1976, was the first day of the trial before Judge McMahon.

BY MR. BEANE:

Q Mr. Rozel, did you execute the document labeled Plaintiff's Exhibit 9 in evidence?

A I did, sir.

Q On the date which is designated on that document?

A To the best of my recollection, sir.

Q The corporate seal that appears on that document, is that the corporate seal of the Magnavox Company?

A Yes, sir.

MR. BERGER: The copy I have does not have any corporate seal.

MR. BEANE: It is very difficult to copy a corporate seal. The original has a corporate seal.

THE SPECIAL MASTER: Was that offered at the main trial of the action?

MR. BEANE: No, it was not, because the issue was never raised.

Q Mr. Rozel, as an officer of Magnavox, did you have authority to execute this assignment?

A I did, sir.

MR. BEANE: I have no further questions.

CROSS EXAMINATION

BY MR. BERGER:

Q Mr. Rozel, you say that to the best of your recollection it was signed on the 22nd of March. Do you remember where you signed it?

A In New York City, sir.

Q Where in New York City?

A Probably in my office.

Q Is your office in New York City?

A Yes, sir, at the present time.

Q Do you know who brought the assignment to you?

A Specifically, no, sir.

Q You don't recall how it came to be in your possession?

A No, sir.

Q Do you know what time of the day?

A No, sir.

Q You have no recollection of when you signed it?

A No, sir.

Q Did you have any discussions with Mr. Kelly? Is that Mr. John Kelly's signature down in the lefthand corner under the "Attest"?

A Yes, sir.

Q Who is Mr. Kelly?

A Mr. Kelly is an attorney on the staff of Magnavox Company, also an attesting secretary of Magnafox Company.

Q Did Mr. Kelly bring the assignment to you?

A It's possible, sir, but I could not swear to it.

Q Do you recall Mr. Kelly giving you $10

when you signed the assignment?

A I do not, sir.

Q Did anybody give you $10?

A Not at that time, no, sir. To my knowledge, no one gave me $10.

Q Do you know whether Magnaleasing, Inc. gave Magnavox Company $10 as is recited in the assignment?

A I have no information, sir.

Q Who would have that information?

A I don't know, sir.

Q Do you have any recollection at all of signing this assignment on March 22, 1976?

A I remember signing it, but the time of the day I cannot recall.

Q I am not talking about the time of the day.

A Yes, I remember--

Q I am talking about the day.

A Yes, sir, I remember very well signing the assignment.

Q But do you remember signing it on March 22, 1976?

A If that's the date, that's the date I signed

it.

Q Mr. Rozel, I really would just like you to answer the question. I asked do you now have any present recollection of signing Plaintiff's Exhibit 9 on March 22, 1976?

A No, I cannot say I have specific recollection.

MR. BERGER: Nothing further.

THE SPECIAL MASTER: Anything else?

MR. BEANE: No.

THE SPECIAL MASTER: You are excused.

(Witness excused.)

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

MR. BEANE: I call Mr. Cline.

W I L L I A M C L I N E, called as a witness by the plaintiff, being first duly sworn by the Notary Public (William Blitz), testified as follows:

THE SPECIAL MASTER: Your full name.

THE WITNESS: William Cline.

THE SPECIAL MASTER: Spell it.

THE WITNESS: C-l-i-n-e.

DIRECT EXAMINATION

BY MR. BEANE:

Q Mr. Cline, by whom are you presently employed?

A Magnavox.

Q In what capacity?

A Manager of facilities and real estate for the Consumer Electronics Company.

Q For how long have you been employed by Magnavox?

A By Magnavox?

Q Yes.

A 16 years.

Q Can you describe your functions as I think you said facilities manager?

A I'm responsible for all the facilities and real property of the Magnavox Company.

Q In what regard are you responsible for it?

A Construction, alterations, repair, maintenance, whatever.

Q Do you hold any professional degrees?

A Yes.

Q Which ones?

A Mechanical engineer.

Q From what school?

A University of Wisconsin.

Q What year did you graduate?

A 1939.

Q Are you a member of any professional societies?

A Only one at the present that I'm adtive in.

Q Which one is that?

A American Institute of Plant Engineers.

Q Have you been a member of any professional societes in the past other than that one?

A Yes, several.

Q Which ones?

A Specifically mechanical engineering, air conditioning, heating, ventilating associations.

Q Were you in charge of the construction of the store at the Staten Island Mall?

A I was.

Q When did your involvement in that store begin?

A Prior to signing the lease.

Q Can you give me a date?

A March or April of 1973, when I first became aware of it.

Q Were you involved in the choosing of the architect and contractors who worked on that job?

A Yes, I was.

Q Would you describe the method by which they were chosen?

A The architect was selected on the basis of past merit, performing work for us on previous occasions.

The contractors were selected on the basis of competitive bids.

Q Were you personally involved in making these selections?

A Yes, I was.

Q Were bids and specifications for the Staten Island Mall store drawn up before the contractors were chosen?

A Plans and specifications were prepared and submitted for proposals for contractors.

Q Would you take it from that point and tell me how the final contractors were chosen?

A The proposals were analyzed and the most

1 competitive--

2 MR. BERGER: Your Honor, how is

3 all this relevant to--

4 THE SPECIAL MASTER: I don't

5 know what he is going to lead to. Move along as

6 quickly as you can.

7 THE WITNESS: The most competitive--

8 bid--bidder was selected to perform the work.

9 Q That had to do with each category of--

10 A Ear facet of the construction.

11 Q Can you tell us exactly what types of

12 construction were done at the mall?

13 A General construction, it consisted of

14 completing demised walls, the front, the facade, if

15 you will, the floor, dividing walls to divide up the

16 facility, suspended ceiling, heating and air condition-

17 ing, ventilating, plumbing, sprinkler system. That's

18 concisely the general construction.

19 THE SPECIAL MASTER: Is that all

20 done by Magnaleasing at its expense?

21 THE WITNESS: It was done for

22 Magnaleasing.

23 THE SPECIAL MASTER: But arranged

24 for by Magnaleasing?

25

THE WITNESS: Yes, sir.

THE SPECIAL MASTER: Did I understand some portion of the cost or expense was reimbursed by the landlord?

THE WITNESS: Yes, there was a tenant allowance.

Also, there was a separate contract for carpeting, sign and fixtures.

THE SPECIAL MASTER: What does this add to what the first witness already testified to?

MR. BLANE: The next question, your Honor.

Q Mr. Cline, it has already been testified to that the total cost of all these construction items was approximately $107,000.

In your opinion, was that cost the most competitive cost that could be obtained for that construction at the point in time when the construction was done in the New York Metropolitan area?

A Yes, as I previously stated, we obtained the most competitive bids available.

Q Mr. Cline, what is the value to Magna-leasing of the improvements in the store at the present

time?

A None.

THE SPECIAL MASTER: Has it been abandoned?

THE WITNESS: It's empty.

THE SPECIAL MASTER: I mean all these improvements are still there?

THE WITNESS: Yes, sir.

THE SPECIAL MASTER: Nothing was removed?

THE WITNESS: No, sir, not to my knowledge.

Q What is the basis of your opinion that the improvements have no value to Magnaleasing?

A First, we no longer perform this type of service for dealers.

Second, the facilities--the general construction was designed and built into the mall facility.

THE SPECIAL MASTER: You mean it was adapted to the particular store?

THE WITNESS: Yes, sir, and so were the fixtures.

Q As an economic matter, are any of the

construction improvements which are put into that mall salvagable?

MR. BERGER: Objection, your Honor.

THE SPECIAL MASTER: That question has been answered.

Next question.

MR. BLANE: I have no further questions.

THE SPECIAL MASTER: Mr. Berger?

CROSS EXAMINATION

BY MR. BERGER:

Q Mr. Cline, who owns the improvements that are in the store over at the Staten Island Mall?

A I merely had them installed in the name of Magnaleasing.

Q So that Magnaleasing still has title to whatever improvements were put in the mall?

A As far as I know, sir.

Q Has any attempt been made to sell whatever improvements are able to be sold to anyone else?

MR. BLANE: Objection, your Honor.

THE SPECIAL MASTER: I think it is a proper question. Answer the question. I will allow it.

A No, sir.

THE SPECIAL MASTER: You say no attempts have been made?

THE WITNESS: Not to my knowledge.

THE SPECIAL MASTER: Is it possible that if some other tenant were to lease that store, such tenant would have use at least to some limited extent of the various improvements or changes that you made?

THE WITNESS: Depending upon the nature--

THE SPECIAL MASTER: The nature of any new occupant.

THE WITNESS: Yes, sir.

Q You said before, Mr. Cline, that you are an employee of Magnavox Company?

A Yes, sir.

Q Have you ever been an employee of Magnaleasing, Inc.?

A No, sir.

Q Did Magnaleasing, Inc., to your knowledge, ever have any employees?

A I cannot attest to that.

Q Any of the work that you did in connection

with the store at the Staten Island Mall was in your capacity as an employee of the Magnavox Company, is that correct?

A As a corporate employee of the Magnavox Company.

Q That is correct?

A Yes.

Q You were not in 1973 an officer of the Magnavox Company, were you?

A No, sir.

Q Have you ever been?

A No, sir.

MR. BERGER: I have no further questions.

THE SPECIAL MASTER: Mr. Beane?

MR. BEANE: No further questions.

THE SPECIAL MASTER: Mr. Witness, you are excused.

(Witness excused.)

THE SPECIAL MASTER: Who is next?

MR. BEANE: Could we take about a five-minute break?

THE SPECIAL MASTER: All right, fine.

(Short recess taken.)

THE SPECIAL MASTER: Can we go forward?

MR. BEANE: Yes, your Honor.

I call Miss Phyllis Blank.

P H Y L L I S B L A N K, called as a witness by the plaintiff, being first duly sworn by the Notary Public (William Klitz), testified as follows:

THE SPECIAL MASTER: Your full name again?

THE WITNESS: Phyllis Blank, B-l-a-n-k.

THE SPECIAL MASTER: Continue, if you will, Mr. Beane.

DIRECT EXAMINATION

BY MR. BEANE:

Q Miss Blank, by whom are you employed?

A Magnavox.

Q For how long have you been employed by Magnavox?

A Since June of 1973.

Q In what capacity are you employed by Magnavox?

A Accountant, budgets and financial analyst.

Q Would you describe your functions as accountant?

A I assist in preparing the yearly financial plan. I also participate in the monthly budgets, special projects and also in Magnaleasing.

THE SPECIAL MASTER: Try to talk just a little louder.

MR. BERGER: I did not get the last part.

THE WITNESS: I also work on Magnaleasing.

Q What functions do you perform with respect to Magnaleasing?

A I book accounts receivable, I book depreciation, and I am, I guess, an overseer on the books themselves.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

Q Are you familiar with the accounting books and records of Magnaleasing?

A Yes, I am.

Q Would you describe what accounting books and records Magnaleasing maintains?

A The basic accounting records, the general

1
2 ledger of Magnaleasing.
3 Q What does that consist of?
4 A Various balance sheet and income statement
5 accounts.
6 Q Is that general ledger maintained separate
7 and apart from books and records of Magnavox or any other
8 entity?
9 A Yes, it is.
10 MR. BEANE: Your Honor, this is
11 the original general ledger of Magnaleasing.
12 I have made copies of each and every page which
13 are the copies that Mr. Berger referred to
14 before which I served on Marshall, Bratter last
15 evening. We did not get the request for these
16 until yesterday morning for the first time.
17 What I would like to do with the
18 Court's permission and if Mr. Berger has no
19 objection is to have the original available, but
20 to mark and use a copy as an official exhibit.
21 THE SPECIAL MASTER: I am sure
22 that is satisfactory.
23 MR. BERGER: No objection, your
24 Honor, subject to checking its accuracy.
25 MR. BEANE: From May, 1976 on,

these records have been kept in the form of a computer printout. It is now mechanized.

I would like to have the computer printout marked as part of the exhibit and that will be part of the exhibit.

THE SPECIAL MASTER: Are you offering these sheets together with the computer printout?

MR. BLANE: That's correct.

THE SPECIAL MASTER: That will be Plaintiff's Exhibit 10. What shall we call that, the ledger sheet?

MR. BLANE: Call it general ledger.

(General ledger, marked Plaintiff's Exhibit 10 in evidence, as of this date.)

THE SPECIAL MASTER: Let me ask you generally for what purpose are you offering this proof?

MR. BLANE: To show to the Court generally how Magnaleasing functions.

THE SPECIAL MASTER: Particularly to show what?

MR. BLANE: To show to the Court

that the Staten Island Mall construction was an asset of Magnaleasing, how it was treated as an asset.

THE SPECIAL MASTER: Isn't it to show that the Magnaleasing records--

MR. BEANE: Exist and Magnaleasing is a functioning corporation.

THE SPECIAL MASTER: Do they disclose the improvements that were made and do they disclose the payments that were made and the payments that were received?

MR. BEANE: That is exactly right.

MR. BERGER: I would like to note for the record that we do not have a copy of the computer printout.

MR. BEANE: Mr. Berger, the computer printout, if you want it, will be furnished to you. As I indicated to Mr. Newman yesterday it was impossible for us to copy it. It was not within the purview of the request made to us, but I will furnish it to you.

MR. BERGER: Thank you.

BY MR. BEANE:

Q How were the leasehold improvements at the

Staten Island Mall treated on the books and records of Magnaleasing?

A As an asset on the books of Magnaleasing.

Q Can you show us in the books the entry which indicates that it is an asset of Magnaleasing?

A Leasehold improvements, Staten Island 107,073.

THE SPECIAL MASTER: I take it these figures are taken at cost, are they, the values?

THE WITNESS: This is at cost and they would have these contra-accounts here where they have Staten Island. At this point in time we also had a security deposit in this amount. We would have to look at the current data to see the actual status of Staten Island at this time. That was the computer printout, if you want to see that.

We take the net then of the cost loss the landlord allowance.

MR. NEWMAN: Is there a page number, a date for this page for the record?

MR. BEANE: For the record, it is Account No. 29-70-02, and it's labeled "Lease-

hold Improvements."

It is in the 1976 series of pages.

Q Did Magnaleasing depreciate these assets on its books and records?

A Yes, they did.

Q Can you show us where the depreciation is taken on its books and records?

A This is through May. Then we went to the computerized system.

THE SPECIAL MASTER: To save time, over what period of time did it depreciate them or at least at what rate?

THE WITNESS: It was 15 years.

THE SPECIAL MASTER: Over 15 years?

THE WITNESS: It was a 15-year amortization, yes.

Q It was done on what periodic basis?

A It was done monthly.

Q Let us identify for the record the page to which we're referring. It is 39-70--

A -02.

Q -- -02?

A Yes.

MR. BERGER: Where does the -02

come in? I only see 39-70.

THE WITNESS: 39-70 and here are the subcodes 01, 02, 03, 04, 05, depending on the mall.

Q What does subcode 02 refer to?

A Staten Island.

Q Did there come a time when depreciation of these assets ceased?

A The last depreciation was taken in July of 1976. July will be reversed though because that was-- we made the entry before we knew that the lease was rescinded, before accounting knew that the lease had been rescinded. So it will be effective as of June 1976.

Q How will this asset be reflected on the books and records of Magnaleasing subsequent to July 1976?

A You're speaking of leasehold improvement account?

Q I am speaking of the Staten Island Mall leasehold improvement.

A We will write it on to our reserve for contingency for possible mall failures.

Q Prior to the rescission of the lease did Maganleasing have any assets other than the leasehold

1 improvements for the Staten Island Mall?

2 A Other--

3 Q Other assets besides the Staten Island

4 Mall leasehold improvements?

5 A We had other leasehold improvements, other

6 malls, yes.

7 Q Which malls were those?

8 A DeSoto--

9 THE SPECIAL MASTER: In any event,

10 you had assets in respect of other malls?

11 THE WITNESS: Yes.

12 Q Were these assets depreciated on the books

13 and records of Magnaleasing?

14 A Yes, they are.

15 Q Were they depreciated in the same general

16 manner as the Staten Island Mall assets were depreciated?

17 A Yes.

18 Q Over the period from August 1973, through

19 the present, has Magnaleasing received any payments

20 from a source other than the Magnavox Company?

21 A Yes, they have received payments.

22 Q From what sources?

23 A We have security deposit payments--

24 THE SPECIAL MASTER: From whom?

25

THE WITNESS: From the malls. When a sublease requires it.

THE SPECIAL MASTER: I don't follow that. He asked you whether there have been any payments received from anyone other than The Mall. Wasn't that your question?

MR. BEANE: No.

Q My question was, have there been any payments by Magnaleasing from any source other than the Magnavox Company?

A We have received security deposits, lease guarantee fees--

MR. BERGER: I think there has already been testimony from Mr. Grenesko about this, hasn't there?

MR. BEANE: Yes, there has. And you are so interested in books and records--

THE SPECIAL MASTER: All right, that's all.

THE WITNESS: Do you want me to continue?

THE SPECIAL MASTER: Just answer his questions.

THE WITNESS: Okay, lease guarantee

fees, amortization of leasehold improvements, rentals and landlord allowances.

Q With respect to these payments, when they were received by Magnaleasing, how were they treated on its books and records?

A A credit was given to the appropriate account and a debit was made to intercompany Magnavox which essentially the intercompany account is a means-- if you look on the books the intercompany account is in a credit balance which essentially is saying that Magnaleasing has a liability to Magnavox. When payments were received, it debited that account which reduced the liability to Magnavox.

Q So that for each such payment received, there was a reduction of liability to Magnavox in the amount of that payment?

A Yes.

Q Was there a corresponding entry made in the books of Magnavox for each such payment?

A Yes, there was.

Q What entry--

THE SPECIAL MASTER: Let me ask a simple question. Maybe we can save a lot of time.

Is it a fact that under the books of Magnaleasing the net cost of the leasehold improvements was $107,000 after deducting any amounts received from The Mall or anybody other than Magnavox?

THE WITNESS: On The Mall books yes.

THE SPECIAL MASTER: Pardon?

THE WITNESS: On The Mall books, yes.

THE SPECIAL MASTER: That's what I am saying, on The Mall books.

THE WITNESS: Yes.

THE SPECIAL MASTER: In other words, if you took the original cost and merely deducted what you got from The Mall or any source other than Magnavox, the net figure would be about $107,000?

THE WITNESS: No, no, no.

MR. BERGER: That is wrong, your Honor.

MR. BEANE: That's wrong, your Honor. Could I clarify that?

Q Why don't you testify?

A You take the 107 and that is the actual

cost of Magnaleasing and from that you deduct the landlord allowance.

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

BY MR. BEANE:

Q Would you describe the method pursuant to which Magnaleasing paid rent bills to the Staten Island Mall?

A Rent bills were paid to Staten Island Mall by first issuing a check request. On a check request would be put the appropriate coding and it would mark on there that it would be charged to Magnaleasing.

There was then an entry crediting cash on the Magnavox books and charging intercompany Magnaleasing. On the Magnaleasing books, there was another entry which would charge the appropriate expense and credit intercompany Magnavox. The intercompany again in a credit position acts as a liability towards Magnavox.

Q So in terms of the relationship between Magnaleasing and Magnavox, what was the net result of a payment by Magnaleasing to the Staten Island Mall for rent?

MR. BERGER: Objection. I don't understand the question.

THE SPECIAL MASTER: You mean the actual dollar payment was made by Magnavox. All that you aresaying is that under the books of Magnaleasing it was a liability of Magnaleasing?

THE WITNESS: Yes.

MR. BEANE: It was a liability from Magnaleasing to Magnavox.

THE SPECIAL MASTER: The amount of that rent appears on the books as a debt from Magnaleasing to Magnavox?

THE WITNESS: Yes.

Q Is Magnaleasing receiving income from sources other than Magnavox?

A Yes.

Q As this income is coming in, what is happening to the liability of Magnaleasing to Magnavox?

A There is a debit to the account that is in essence reducing the liability.

Q Can you describe the method in which Magnaleasing reports its assets, liabilities, income?

A It has a balance sheet and income statement.

THE SPECIAL MASTER: On the books,

the balance sheet, what is the present total indebtedness, about, from Magnaleasing to Magnavox?

THE WITNESS: I would have to check the balance sheet at this time.

THE SPECIAL MASTER: Can you approximate it?

THE WITNESS: We made an accounting entry last month dealing with taxes which I believe put it into a debit position. Thereby, it is not indebted at this time. I don't want to say that.

I have been on vacation. I did not get the check--what the entry was, but there is a debit balance in the intercompany account at this time.

THE SPECIAL MASTER: Would you say generally that there has been a debit balance from Magnaleasing?

THE WITNESS: It has been a credit balance, I believe, until last month, if I can check my records.

THE SPECIAL MASTER: In other words, it was not always a debit balance?

THE WITNESS: No.

THE SPECIAL MASTER: From Magnaleasing to Magnavox?

THE WITNESS: No.

THE SPECIAL MASTER: That, of course, would depend on income from the many, many sources that might be credited to Magnaleasing?

THE WITNESS: Right.

Q Miss Blank, would it help you to look at the computer printout sheets?

A Yes, let me see this.

It has been in a credit position, a liability, until July.

THE SPECIAL MASTER: What do you mean a credit position, a liability? You mean up until July on the books it owed money to Magnavox?

THE WITNESS: To Magnavox, yes.

THE SPECIAL MASTER: Presently it does not?

THE WITNESS: No. Not according to this entry. But I do not know what is entailed in that entry. It is a tax entry, I believe.

Q How does Magnaleasing report its financial standing, so to speak, at a particular point in time, for example, at the end of the fiscal year or some other fiscal year?

A I don't think I understand the question.

Q Let me rephrase it.

Does Magnaleasing issue any annual report or quarterly report of any kind?

A There is a monthly balance sheet and income statement.

Q Other than that, does Magnaleasing issue any reports?

A No. Not to my knowledge.

Q Are the Magnaleasing financial figures included in a consolidated statement of some kind?

A Yes, they are.

Q Would you describe that, please?

A It is incorporated into the consolidated balance sheet and income statement of Magnavox.

Q Is Magnavox in turn included in some sort of consolidated statement?

A I do not work in consolidations for Magnavox. I'm sorry.

MR. BEANE: I have no further

1 questions.

2 CROSS EXAMINATION

3 BY MR. BERGER:

4 Q Before this entry in July, how much did

5 Magnaleasing owe Magnavox?

6 A There is a credit balance of 464,215.

7 THE SPECIAL MASTER: You said credit

8 balance. You mean today?

9 THE WITNESS: A credit balance is

10 normally designated--

11 THE SPECIAL MASTER: You mean

12 in favor of Magnavox? We're thinking in terms

13 of Magnaleasing. It was money or that was a

14 figure that Magnaleasing owed, is that correct?

15 THE WITNESS: Yes.

16 THE SPECIAL MASTER: Off the record.

17 (Discussion off the record.)

18 THE SPECIAL MASTER: Is it your

19 testimony that prior to an entry in July of this

20 year, according to the books of Magnaleasing,

21 Magnaleasing owed money or was indebted to

22 Magnavox?

23 THE WITNESS: Yes.

24 THE SPECIAL MASTER: However, as

25

a result of some entry made in July of this year, is it your testimony that there now is some credit from Magnavox to Magnaleasing, that is, Magnavox is indebted to Magnaleasing?

THE WITNESS: Yes.

BY MR. BERGER:

Q Prior to this entry, how much did Magnaleasing owe or was indebted to Magnavox?

A Approximately 464,000. Do you want the exact figure?

Q Yes.

A 464,215.

Q Can you explain why Magnavox now owes Magnaleasing money?

A As I have stated, I did not check on the journal entry.

THE SPECIAL MASTER: How much does it owe? Do you know the figure, about?

THE WITNESS: 23,186.

Q When you talk about a check request being made, that is a check request within Magnavox?

A A check request is a form to be used.

Q And it is used by the Magnavox Company?

A Magnaleasing uses it.

Q They make a check request of the Magnavox Company? In other words, Magnaleasing requests a check from the Magnavox Company?

A They request a check be issued, yes.

Q By the Magnavox Company?

A We in Fort Wayne use a general fund to issue checks.

All checks issued from the Fort Wayne Magnavox Company are issued on the same check and it says the Magnavox Company whether we are issuing this for Magnaleasing or any of our other subsidiaries.

Q But a check does not come from Magnaleasing, Inc.?

MR. BEANE: There has been all sorts of testimony--

MR. BERGER: There seems to be confusion, Mr. Beane. I am trying to find out--

MR. BEANE: She is not confused.

A There is not a checking account so that a check says Magnaleasing.

THE SPECIAL MASTER: I think that is clear, Mr. Berger. That has been established earlier this afternoon.

Q There are references here to five malls,

DeSoto, Staten Island, Town East, Laurel Mall and East Ridge.

Do you know where the entries are or are there any entries with respect to the other malls that Magnaleasing, Inc. signed leases for?

A If we did not have leasehold improvements, we would not put them on our records. Some of these were designated as space leases where we did not put the improvements in.

Q Somewhere in the ledger, the general ledger, are there references to other malls other than the five listed there?

A Yes.

THE SPECIAL MASTER. Let me ask you this: According to the records of Magnavox and Magnaleasing, do the same accounting employees act for both entries, the parent and the subsidiary?

THE WITNESS: Yes.

THE SPECIAL MASTER: The same people who keep the records for one keep the records for the subsidiary?

THE WITNESS: Yes.

May I add that the amount of time

spent on Magnaleasing I do not feel would warrant an employee for Magnaleasing in the accounting area.

Q What Magnavox or Magnaleasing records would show what happened to Magnaleasing's $464,000 debt to Magnavox?

A It is still on our books. What do you mean what happened to it?

Q What documents back up why it is now--

A You mean what happened to that one journal entry?

Q Yes.

A I would have to pull the journal entry to see it. I did not at the time.

MR. BERGER: Can we have that produced, your Honor, just to find out how this thing suddenly became--

MR. BEANE: I can't see the relevancy of it.

MR. BERGER: You introduced it into evidence.

THE SPECIAL MASTER: It does not matter who introduced it. We've gone into this at great length. This all stems from the

position of defendants' counsel that plaintiff as such did not pay for it. We have gone into this. I don't know that this is going to make much difference. Would it be much of a burden to explain that?

MR. BEANE: I can't answer that.

THE SPECIAL MASTER: Where is Miss Blank located?

MR. BEANE: Fort Wayne, Indiana.

MR. BERGER: It is very relevant.

MR. BEANE: In what regard?

MR. BERGER: You are the one who introduced it, Mr. Beane.

THE SPECIAL MASTER: You introduced the records.

Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: The witness has been asked to explain that prior to July of 1976 there was an indebtedness on the books of Magnaleasing of some $464,000, but that as a result of an entry in July 1976, there appeared to be a credit on the books of Magnaleasing from Magnavox of about $23,000.

The witness has stated that upon her return to the accounting offices of Magnaleasing or Magnavox, she will prepare a statement explaining the nature of this credit, and attach to it any supporting or clarifying documents.

This will be made available to defendants' counsel, and the Court will then determine whether it is necessary to have the witness return in order to be cross examined as to such information.

BY MR. BERGER:

Q Just showing you the first page of the general ledger under accounts receivable, what do the figures that are in parenthesis represent? Like there is a 620 in parenthesis.

A That is a receipt of cash.

Q That is a receipt of cash?

A Yes.

Q Is that true throughout the general ledger where--

A No.

Q What do other figures--

A 3210 entry which if you look here in your reference, a 3210 is a receipt of cash. That's a

cashbook reference.

Q What is a 3245?

A A 3245 is an account receivable entry where that amount is billed to a dealer. 3245 is a billing. 3210 is a cashbook entry.

Q How about 3292, what does that mean?

A That is a writeoff.

Q At other places in the general ledger where figures appear in parenthesis, what does the parenthesis signify? For instance, reserve for contingency, that page there is a figure--

A That is setting up a liability. A liability is--

MR. BEANE: Mr. Berger, could you identify the page to which you are referring?

MR. BERGER: Yes, I just did, reserve for contingencies, 59-50.

THE WITNESS: -01.

Q Can you state again what that is?

A Yes, a liability is a credit account. We were setting up a reserve. So naturally it is a credit.

MR. BERGER: I have no further questions at this time.

MR. BEANE: Your Honor, I want to make the record clear at this time.

It is my understanding of your Honor's direction that Miss Blank will explain a particular entry and provide the documentation with respect to that entry, and that if in your view that that documentation and explanation is sufficient, Miss Blank will not have to return for further cross examination.

If there are any other issues, I think those issues should be examined right now.

MR. BERGER: I told you, Mr. Beane, that since I just got these documents a few hours ago--

MR. BEANE: Stop beating a dead horse.

THE SPECIAL MASTER: Wait a minute.

MR. BERGER: I want to reserve the right to call her back.

THE SPECIAL MASTER: You are reserving the right to call her back. I recognize that.

Apart from that, are there any other matters you want to inquire into?

MR. BERGER: No.

THE SPECIAL MASTER: Defendants' counsel acknowledges that except for possible further cross examination of this witness with respect to entries made on the books of Magna-leasing, there are no other areas as to which he seeks further to cross examine any of the plaintiff's witnesses.

(Witness excused.)

THE SPECIAL MASTER: Off the record.

(Discussion off the record.)

THE SPECIAL MASTER: The parties are to submit briefs to me by October 8th.

Plaintiff will also revise schedules as to the damage claims for taxes and common area charges.

In accordance with my direction, plaintiff will file with me the sworn statement and additional documents to be furnished by the witness Miss Blank, and the Court then, after conferring with counsel, will determine whether it is necessary to produce her again for any possible further cross examination.

(Time noted: 7:15 p.m.)

I N D E X

WITNESSES

	DIRECT	CROSS	REDIRECT	RECROSS
Henry L. Grenesko	27	82		
Samuel J. Rozel	96	98		
William Cline	101	108		
Phyllis Blank	111	128		

EXHIBITS

PLAINTIFF'S		FOR IDENT.	IN EV.
1	Document entitled "Magna-leasing Leasehold, Improvements"	30	31
2	Invoice and attached check No. 688935		34
3	Copy of joint statement of stipulated and disputed facts		37
4	Group of invoices of Magna-leasing, Inc.	45	
5	Lease between Magnaleasing and defendant	49	50

INDEX OF EXHIBITS CONTINUED

PLAINTIFF'S		FOR IDENT.	IN EV.
6	Document headed "Leasehold Improvements - Damages"	52	52
6A	Handwritten document entitled "Leasehold Improvements - Interest"	54	54
7	Document entitled "Common Area Charges, August 1973 to January 1974"	58	58
7A	Document headed "Common Area"	67	68
8	Document headed "Taxes, August 1973 to June 30, 1974"	68	
8A	Document headed "Taxes"		80
9	Document entitled "Assignment"		97
10	General ledger		114
DEFENDANTS'			
A	Document dated August 18, 1976 to Jeffrey Newman from Keane & Butler	81	81
B	Request for check voucher	93	94

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, WILLIAM BLITZ, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the transcript of the proceedings hereinbefore set forth, was duly reported by me and that such transcript is a true record of the hearing.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 26th day of MAY, 1977.

WILLIAM BLITZ, CSR

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -X

MAGNALEASING, INC., :

Plaintiff, :

-against- :

STATEN ISLAND MALL, BLACKFRIARS :
REALTY CORP. and TOTTENHAM
REALTY CORP., :

Defendants. :

- -X

Hearing before HON. MARTIN D. JACOBS, as Special Master, pursuant to Order of HON. Lloyd F. McMahon, dated June 30, 1976, "...to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff," at the U. S. Courthouse, Foley Square, New York, N. Y. 10007, on November 4, 1976 at 1:15 p.m. Reported by Ivan Stern, a Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

Messrs. KEANE & BUTLER,
Attorneys for plaintiff,
200 Park Avenue,
New York, N. Y. 10017
BY: EDWARD F. BEANE, ESQ.,
BLANE MADDEN, ESQ.,
Of Counsel

Messrs. MARSHALL, BRATTER, GREENE, ALLISON & TUCKER,
Attorneys for defendants,
430 Park Avenue
New York, N. Y. 10022
BY: JAMES BERGEN, ESQ.,
JEFFREY NEWMAN, ESQ.,
Of Counsel

oOo

THE SPECIAL MASTER: After the hearing before me on August 31, I had conferences with counsel on October 12th and October 27th in which we discussed what further testimony was to be offered pursuant to my directions.

I understand that the plaintiff today has produced certain witnesses for further examination.

You may proceed.

MR. BEANE: There are certain preliminary matters I think that we should get out of the way before we proceed to continue with the cross examina-

tion.

That simply has to do with certain additional exhibits which pursuant to Your Honor's directions we have submitted to you and also we have submitted copies to Marshall, Bratter, Greene, Allison & Tucker.

However, so the record is complete, I would like to have these exhibits formally marked in the record now because they have not been done so to date.

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

THE SPECIAL MASTER: They will be received in evidence as Plaintiff's Exhibit No. 11 the sublease dated July 16, 1973.

(Sublease dated July 16, 1973 received and marked as Plaintiff's Exhibit 11 in evidence as of this date.)

THE SPECIAL MASTER: You may continue.

MR. BEANE: The next such exhibit is the affidavit of Phyllis Blank which Your Honor directed be submitted.

MR. NEWMAN: I object to this because she did not testify as to what was in the affidavit.

THE SPECIAL MASTER: At the last hearing before me, I thought it was agreed that she would file an affidavit and that I will receive it for whatever it might be worth.

It will be received as Plaintiff's Exhibit No. 12 in evidence.

Affidavit of Phyllis Blank sworn to September 24, 1976.

(Affidavit of Phyllis Blank sworn to September 24, 1976 received and marked as Plaintiff's Exhibit 12 in evidence, as of this date.)

THE SPECIAL MASTER: You may proceed.

MR. BEANE: The next exhibit, Your Honor, is Plaintiff's Revised Exhibit 7 and 7A which is the exhibit of Magnaleasing common area charge overpayment including all amounts paid by Magnaleasing subtenants and also correcting the mathematical errors which appeared on the original exhibit and you directed that we file such revised exhibit at the last hearing.

THE SPECIAL MASTER: Any objections?

MR. NEWMAN: No objection.

THE SPECIAL MASTER: This will be received in evidence as Exhibits 7 and 7A; plaintiff's revised exhibits based on the CPI inflation rate and

1 also based on other statistical data.

2 MR. BEANE: I ask that it be marked

3 for clarification sake as Plaintiff's Revised

4 Exhibits 7 and 7A respectively.

5 (Plaintiff's Revised Exhibits

6 based on the CPI inflation rate

7 and other statistical data re-

8 ceived and marked as Plaintiff's

Revised Exhibits 7 and 7A in

evidence, as of this date.)

9 MR. BERGEN: I don't want to burden the

10 record but Mr. Newman said a couple of minutes ago

11 that we have no objection to these documents.

12 I just want the record to be clear that

13 we have objection to this entire presentation be-

14 cause these are the very documents that should have

15 been introduced at trial.

16 THE SPECIAL MASTER: I understand your

17 position.

18 MR. BEANE: There is one further exhibit

19 that is Plaintiff's Revised Exhibits 8 and 8A which

20 are the schedules of tax overpayments and interest.

21 They were revised simply to include that

22 portion of the taxes which were paid to the Staten

23 Island Mall by Magnaleasing subtenant and I ask that

24 they be marked as Plaintiff's Exhibits 8 and 8A.

25 THE SPECIAL MASTER: Any objection?

MR. NEWMAN: No.

THE SPECIAL MASTER: They will be received in evidence as Plaintiff's Revised Exhibits 8 and 8A dealing with tax payments.

(Schedule of tax overpayments and interest received and marked as Plaintiff's Revised Exhibits 8 and 8A in evidence, as of this date.)

MR. BEANE: Turning back for a moment to the Revised Exhibits 7 and 7A which is based on the 15.5 percent inflation rate, I had a telephone conference with Mr. Newman last evening and I believe that we have agreed with respect to that exhibit and certain exhibits which he will introduce which will be based on the same statistics as to the method of our arriving at our respective inflation rates.

Rather than calling a witness as to how the inflation rate was derived, I would, with Mr. Newman's permission simply indicate on the record as to the manner in which we calculated 15.5 percent inflation rate since it is taken directly from documents which are in evidence; namely, certain tables upon which the compilation was made.

Do you have any objection to that?

MR. NEWMAN: Are the tables in evidence?

MR. BEANE: The tables are in evidence. They are part of the revised exhibit.

MR. NEWMAN: I have no objection.

MR. BEANE: The 15.5 percent inflation rate was derived from two publications put out by an organization called Urban Land Institute, one of which is called The Dollars & Cents of Shopping Centers, 1972 and the other which is called The Dollars & Cents of Shopping Centers, 1975.

What we did was we went to a chart dealing with the northeast region involving regional malls, and that is table 4-2 in the 1975 book, and we computed the total common area expenses as set forth in that table excluding therefrom real estate taxes because real estate taxes are separately allocated at this mall.

Then we used as best as we could a chart in the 1972 compilation table 2-2 and we again totalled the operating expenses and these are medium operating expenses for a certain number of malls -- regional malls in the northeast, and again excluding real estate taxes from that computation and then subtracted the 1972 figures from the 1975 figure and

1 from that derived a percentage increase in common
2 area charges over the three years of 46.5 percent.
3 When you divide the 56.6 by 3, you come
4 up with 15.5 percent a year which is the figure we
5 used.
6 I would point out for the Court's
7 edification that these charts in our opinion are
8 not the most reliable indication of the inflation-
9 ary rate because they do not list the malls that
10 they used to derive the medium common area charges.
11 They do say that the 1972 table uses
12 fourteen malls and the 1975 table uses twenty-five
13 malls. I don't know that they are the same malls
14 and I don't know which malls they are.
15 I think if you look at the tables it is
16 evident but we did submit these statistics pursuant
17 to Your Honor's direction as to how we arrived at
18 them.
19 MR. BERGEN: Are they relying on them
20 or not?
21 MR. BEANE: We are relying on the CPI
22 index. We submitted them as statistical --
23 THE SPECIAL MASTER: I think that is clear.
24 The other data resulted from my own suggestion which
25

1
2 may or may not have been of some merit.
3 Off the record.
4 (Discussion off-the-record.)
5 MR. BEANE: We are up to the point
6 when Miss Blank was in the process --
7 THE SPECIAL MASTER: Are those not being
8 offered?
9 There is no reason to do it.
10 Off the record.
11 (Discussion off-the-record.)
12 THE SPECIAL MASTER: You may proceed.
13 MR. NEWMAN: We call Miss Blank to the
14 stand.
15 THE SPECIAL MASTER: Note that Miss Blank
16 has been recalled as a witness.
17 P H Y L L I S B L A N K, recalled as a witness,
18 resumed the stand, and testified further as follows:
19 EXAMINATION BY MR. NEWMAN:
20 Q I show you copies of Magnaleasing income
21 statements and balance sheets from 1974 through September
22 of 1976.
23 These were produced to us, as you may know
24 by Magnaleasing's counsel.
25 I ask if these are in fact what they purport

to be?

A Yes.

Q You recognize them?

A Yes.

MR. NEWMAN: I offer these financial statements in evidence as Defendants' Exhibit C.

MR. BEANE: I just want to make sure it is the same one.

No objection.

THE SPECIAL MASTER: They will be received in evidence without objection as Defendants' Exhibit C.

(Financial Statements of plaintiff for a period of 1974 through 1976, received and marked as Defendants' Exhibit C in evidence as of this date.)

Q I am going to ask you a couple of questions to make sure that we are all reading this chart correctly.

I call your attention in particular to the third page of Defendants' Exhibit C which is entitled Magnaleasing Income Statement, Second Half, 1974 and in particular to the line marked subtotal (profit) before tax.

The figure appearing there is $129,094.

If I read this correctly, Magnaleasing has

a pretax loss as of the end of 1974 of $129,094; is that right?

A Yes.

Q I call your attention to the income statement for Magnaleasing for the second half of 1975.

Looking at the same column, the subtotal (profit) before tax, I take it this means that as of the end of 1975 Magnaleasing had a pretax loss of $202,385; is that right?

A Yes.

Q I call your attention to the last sheet in Defendants' Exhibit C, a computer printout entitled The Magnavox Company Division Statement of Income, 9/76 Magnaleasing and in particular to the line marked net profit before FI tax.

I take it that as of September 30, 1976, Magnaleasing shows pretax losses of $883,235; is that right?

A Yes, that is what it shows.

MR. BEANE: For the record, we have a continuing objection to this entire line of questioning as being irrelevant and immaterial.

Your Honor has already made a ruling on that but I want the record to be clear that we

1 believe that all of this material is not relevant
2 to the issues in this hearing.
3 THE SPECIAL MASTER: I have only received
4 it for whatever significance it may have in connec-
5 tion with the relationship between plaintiff Magna-
6 leasing and the parent corporation.
7 MR. BEANE: I understand. I just want
8 my position made for the record.
9 BY MR. NEWMAN:
10 Q I was just told by your counsel that there
11 was no income statement available for Magnaleasing for
12 the year of 1973; is that right?
13 A Yes.
14 Q Why is that?
15 MR. BEANE: Objection. It is totally
16 irrelevant and immaterial.
17 THE SPECIAL MASTER: Answer the question,
18 if you can.
19 A Well, it is not available in the format such
20 as we see it there.
21 Those were prepared by myself for management
22 purposes. It was probably put as a line item for record-
23 ing purposes on the Magnavox -- I don't know if it was
24 corporate or radio or T.V. -- I am not saying that it did
25

not have an income or it did not have a loss. I am saying I did not have the sheets.

Q Is there a piece of paper within Magnavox which could identify the amount of pretax losses Magna-leasing incurred as of the end of 1973?

MR. BEANE: I raise the same objection.

THE SPECIAL MASTER: Answer the question, if you can.

A I believe there is.

MR. NEWMAN: I would like to call upon plaintiff's counsel to produce that piece of paper and with the consent of plaintiff's counsel or at the directive of the magistrate, I would like, after this hearing is over to deem that piece of paper as part of the record in the same fashion as Defendants' Exhibit C.

Is that agreeable, Mr. Beane?

MR. BEANE: Your Honor, if there is such a piece of paper, and I certainly don't know if there is or not, and I am not sure that Miss Blank does either --

THE SPECIAL MASTER: I am not going to extend this hearing. My ruling is that if there is such a document, it will be tendered to me and

deemed received in evidence.

BY MR. NEWMAN:

Q Miss Blank, you prepared an affidavit in response to the question as to why a $464,000 plus indebtedness from Magnaleasing to Magnavox became a $23,000 plus indebtedness from Magnavox to Magnaleasing, and I just have a few questions which were suggested by your answer.

Do you know of an agreement between North American Philips and Magnavox that compelled the transaction by which Magnavox in effect credited Magnaleasing with this four hundred thousand dollar plus indebtedness item?

MR. BEANE: Objection, Your Honor.

THE SPECIAL MASTER: I don't know what it leads to.

THE WITNESS: The tax entry was made in the ordinary course of business transferring the tax reserve to Magnavox Corporation for consolidation purposes.

MR. NEWMAN: Read back the last question.

(Question read.)

BY MR. NEWMAN:

Q To your knowledge, was there anything in the

1 alleged agreement between North American Philips and
2 Magnavox which required that this credit be given to
3 Magnaleasing?
4 A I think that the answer will probably come
5 from our tax department. I don't work with taxes.
6 THE SPECIAL MASTER: I think that is
7 a sufficient answer.
8 THE WITNESS: I know that it is trans-
9 ferred for consolidation purposes.
10 Q If I asked you the same question and you said
11 that you knew of an agreement between Magnavox and
12 Magnaleasing that compelled that transfer, would your
13 answer be the same?
14 A Yes.
15 Q Just to simplify it, is it fair to state that
16 to show that Magnaleasing had a pretax loss of $883,000
17 plus, would that be tantamount to showing that a four
18 hundred thousand dollar plus tax savings is generated?
19 A Yes.
20 Q Was that savings ultimately enjoyed by
21 Magnavox?
22 A It was transferred to Magnavox. I don't
23 work in taxes.
24 THE SPECIAL MASTER: Off the record.
25

(Discussion off-the-record.)

BY MR. NEWMAN:

Q Wasn't the four hundred thousand dollar plus credit extended from Magnavox to Magnaleasing in effect a reflection of this tax taken?

A From Magnavox to Magnaleasing?

Q The transaction that you have just explained in your affidavit.

A From Magnaleasing to Magnavox?

Q Yes.

A It reflected tax benefit, yes.

Q Wasn't it principally just that?

A Yes.

Q Wasn't it solely just that?

THE SPECIAL MASTER: Mr. Newman, please don't belabor that point.

I think that your question is simple and you have had a simple answer. Let us go on to something else.

Q The entry in question is posted on July 31, 1976; is that right?

A I believe it was, yes.

Q Prior to that time, had there ever been a similar such transaction as between Magnavox and Magnaleasing?

1
2 A Yes.
3 Q When?
4 A I would have to check the general ledger.
5 MR. BEANE: Which is in evidence.
6 Let the record reflect that Miss Blank
7 is examining Plaintiff's Exhibit 10 which is a
8 general ledger of Magnaleasing.
9 A In 1975, in the inter-company account, there
10 is a general entry at 12/31/75, 25,000.
11 MR. NEWMAN: The witness is looking at
12 the third page of the exhibit.
13 MR. BEANE: Off the record.
14 (Discussion off-the-record.)
15 THE WITNESS: 2502 is number of the page.
16 Also there is an entry here at 2/28/75
17 for 65,000 debit on 25-02-10.
18 Q These are inter-company transfers?
19 A This is inter-company just as the entry made
20 in July.
21 Q Because of tax savings generated by Magna-
22 leasing's losses in effect?
23 A Yes.
24 MR. NEWMAN: I have no further questions
25 of this witness.

THE SPECIAL MASTER: Mr. Beane?

MR. BEANE: I just have about two or three questions.

EXAMINATION BY MR. BEANE:

Q Miss Blank, with respect to the 1976 tax transfer to which Mr. Newman addressed himself, at the time that the transfer was made from the books of Magnaleasing to Magnavox, did Magnaleasing obtain any benefit from that transaction?

A Their liability to Magnavox was decreased.

Q So that they did obtain a benefit from that transaction?

A Yes.

Q With respect to the income and balance sheets which have been marked collectively as Defendants' Exhibit C, are the items on those sheets simply a summary of what appears in the general ledger?

A Yes.

Q Is there a general ledger in existence for the period in 1973 when Magnaleasing was in existence?

A Yes.

Q Could you from that general ledger prepare something similar to the documents that exist for 1974 and 1975?

A Yes.

MR. BEANE: Off the record.

(Discussion off-the-record.)

BY MR. BEANE:

Q Did you prepare such a balance sheet or income statement for 1973?

A No, but what I prepared is those schedules which are for management purposes only.

Q And the tax transfers that you referred to, the one in 1976 and the two in 1975, were they made in the ordinary course of Magnaleasing's business?

A Yes.

MR. BEANE: I have no further questions.

BY MR. NEWMAN:

Q Miss Blank, is it not true that Magnaleasing never had any cash of its own?

MR. BEANE: Objection.

A Any real cash?

Q Money, expenses --

THE SPECIAL MASTER: Wasn't that not fully developed at the last hearing? Why are we belaboring it?

MR. NEWMAN: This is somewhat separate. I just have one more question. Could I have an

answer to that question?

Q Is it not true that Magnaleasing had no way to pay back its indebtedness to Magnavox except by such an inter-company transaction as you have testified to?

MR. BEANE: Objection.

THE SPECIAL MASTER: I will allow it.

A No.

The recoupment of cost on the lease hold improvements would have brought in the income to cover the monies expended for lease hold improvements.

Q Recoupment of costs would have been a vehicle for Magnaleasing to pay back the four hundred thousand dollar indebtedness; is that your testimony?

A Yes.

MR. NEWMAN: I have no further questions.

THE SPECIAL MASTER: You are excused.

MR. BEANE: Before Mr. Newman proceeds to call the remaining individuals that we have produced, I have another witness which goes just to the inflation; the proper inflationary rate issue.

He has graciously consented to come down and testify.

THE SPECIAL MASTER: Do you want to call him out of turn?

MR. NEWMAN: I object.

The plaintiff has rested --

THE SPECIAL MASTER: I am going to allow him.

This is in explanation of an exhibit that has been received.

MR. BEANE: Your Honor, if you read the transcript, what happened was that the cross-examination of Miss Blank was never completed. I never rested. There are no words --

THE SPECIAL MASTER: In any event, don't belabor that.

This question of inflation was raised by the court itself.

Accordingly, if you want to offer anything further, anything further to supplement it, you may do so.

MR. BEANE: I do, Your Honor.

I wish to call Mr. Clarence Farrar.

C L A R E N C E F A R R A R, called as a witness, being first duly sworn by the Notary Public (Ivan Stern), testified as follows:

EXAMINATION BY MR. BEANE:

Q Mr. Farrar, by whom are you employed?

A Bond Stores, Inc.

Q How long have you been employed by Bond Stores?

A Twenty-two years.

Q In what capacity are you presently employed by them?

A Vice-President-Operations.

Q Did you hold that position for the period between 1973 and 1976?

A Yes.

Q Prior to that time what was your position?

A Prior to that I was Regional Vice-President of the Southwest Region.

Q In your job functions as both Regional Vice-President and your present capacity, was it part of your job function to oversee rental payments of sorts in various malls that Bonds had?

A Yes.

Q Would those rent payments include the payments of common area charges?

A Yes.

Q Does Bonds have any stores in enclosed malls in the New York Metropolitan Area?

A Yes.

Q Which ones are those?

A We have Willowbrook.

Q Where is that?

A That is in New Jersey and Kings Plaza.

Q Where is that?

A That is in Brooklyn.

Q With respect to those two stores, does Bonds pay their proportionate share of all common area charges incurred at those two malls?

MR. NEWMAN: I object as to form.

THE SPECIAL MASTER: I will allow it.

A Yes.

Q Did you prepare a chart comparing common area charges paid by the Bond Stores at both Willowbrook, Kings Plaza and a store that it has at the Staten Island Mall for the years of 1973, '74 and '75 and '76?

A Yes.

MR. BERGEN: I don't see what this has to do with the Staten Island Mall. This man is not an expert on inflation.

THE SPECIAL MASTER: The practice of or experience or some other business operation may conceivably throw some light on what significance should be given to inflation.

I don't know that it is a particular

important point but we do go far afield in much of the proof here.

BY MR. BEANE:

Q I show you this and ask you if this is the chart that you prepared?

A Yes.

MR. BEANE: I ask that it be deemed marked in evidence as Exhibit 13.

MR. BERGEN: I object to it.

THE SPECIAL MASTER: It will be received.

(A chart prepared by witness received and marked as Plaintiff's Exhibit 13 in evidence, as of this date.)

BY MR. BEANE:

Q Looking at that chart, and with respect to the figures for both Willowbrook and Kings Plaza under the column labelled Rate Per Square Foot Per Year, do those represent the per square foot per year figures actually paid by Bond Stores at those locations?

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. BEANE: The document speaks with respect to the computations.

I have no further questions.

EXAMINATION BY MR. BERGEN:

Q When were you asked to prepare this chart?

A Yesterday, I believe.

Q Is Bond Stores presently suing the Staten Island Mall?

MR. BEANE: Objection as not being relevant and it is entirely immaterial.

THE SPECIAL MASTER: I will allow it.

A I can't honestly answer. I don't honestly know. I know there is an involvement. I am not involved in litigation.

Q Is it not a fact that Keane & Butler, Mr. Beane's law firm is representing Bond Stores in this litigation?

A I believe that is correct.

Q Is it not a fact that Bond Stores has not paid any rent at the Staten Island Mall in seven months?

MR. BEANE: Objection. It is totally irrelevant and immaterial.

THE SPECIAL MASTER: Answer it briefly.

MR. BERGEN: I say that it is relevant.

THE SPECIAL MASTER: I will allow him to answer.

A I believe that to be substantially correct.

I cannot testify as to the number of months -- the specific number of months.

Q You say that you were asked first to prepare that chart yesterday?

A I believe that to be so.

Q Did you ever speak to Mr. Beane or anyone from Keane & Butler about the subject prior to yesterday?

A No.

MR. BERGEN: I have no further questions.

THE SPECIAL MASTER: You are excused. Off the record.

(Discussion off-the-record.)

MR. BERGEN: I wish to call Mr. Kelly.

J O H N F. K E L L Y, called as a witness, being first duly sworn by the Notary Public (Ivan Stern), testified as follows:

EXAMINATION BY MR. BERGEN:

Q Are you an officer of Magnaleasing?

A Yes.

Q What position do you hold with Magnaleasing?

A I am a vice-president.

THE SPECIAL MASTER: What are your responsibilities? What department are you in? Do you touch every base?

THE WITNESS: I touch a number of bases.

Q Mr. Kelly, were you not the one that negotiated all of the leasing losses for Magnaleasing?

A Yes.

Q Did anybody else negotiate any leases?

A Not to my knowledge.

Q Was there anything else that Magnaleasing did other than negotiate and sign leases?

MR. BEANE: Objection.

A Yes.

Q Do you know if there have been any meetings of the Board of Directors of Magnaleasing?

A Yes.

Q I show you a document which is a copy of some Magnaleasing minutes of meetings which were produced to us by Mr. Beane and ask you if you have ever seen these.

A Yes, I have.

Q Are those the meetings of the Board of Directors of Magnaleasing?

A Yes. Some of the documents are, yes.

MR. BERGEN: I would like to offer that in evidence, Your Honor.

THE SPECIAL MASTER: I take it that there is no objection.

MR. BEANE: No. There is no objection that these are the minutes.

THE SPECIAL MASTER: That will be received in evidence as Defendants' Exhibit D.

The minutes covering meetings from May 2, 1973 to May 8, 1975.

(Minutes covering meetings from May 2, 1973 to May 8, 1975 received and marked as Defendants' Exhibit D in evidence, as of this date.)

BY MR. BERGEN:

Q Did Magnaleasing ever have any employees of its own?

A Not to my knowledge.

MR. BEANE: Objection.

THE SPECIAL MASTER: That will be allowed.

Q When did Magnaleasing cease actively doing business?

MR. BEANE: Objection.

THE SPECIAL MASTER: Allowed.

A To my knowledge, they have not.

Q Didn't you testify at the trial that at some point Magnaleasing stopped entering into leases for these home entertainment centers?

A Yes.

Q Was that not the sole business of entering into these leases?

A No.

Q What was the other business of --

A Subleasing them -- subleasing these to Magnavox dealers.

THE SPECIAL MASTER: In other words, there is still outstanding some of the leases which Magnavox made prior to the time that it ceased to make such leases?

THE WITNESS: They are all outstanding with the exception of the Staten Island Mall.

Q Other than that, are there any new leases that have been entered into?

A None at this point, no.

MR. BERGEN: I have no further questions.

MR. BEANE: No cross.

MR. NEWMAN: We have looked at the Dollars & Cents of Shopping Centers of 1972 and 1975 published by the Urban Land Institute.

I am going to offer in evidence as Defendants' Exhibit E copies of a page from the 1972 publication and the 1975 publication.

These deal with regional shopping centers in the northeast.

THE SPECIAL MASTER: Any objection?

MR. BEANE: No.

THE SPECIAL MASTER: They will be received as Defendants' Exhibit E.

Certain statistical data taken from Dollars & Cents of Shopping Centers.

(A copy of a page from the 1972 publication and 1975 publication of Dollars & Cents of Shopping Centers received and marked as Defendants' Exhibit E in evidence, as of this date.)

MR. NEWMAN: The next exhibit I would like to offer in evidence is a copy of another two pages from these same publications, 1972 and 1975. This one, however, instead of focusing on regional centers in the northeast focuses on enclosed malls, regional centers, specifically in the category one to three years of age.

It has been stipulated in this case that the Staten Island Mall, of course opened for business in August of 1973.

THE SPECIAL MASTER: That will be received as Defendants' Exhibit F.

Certain sheets from the publication Dollars & Cents.

(Two pages from publication of Dollars & Cents of Shopping Centers received and marked as Defendants' Exhibit F in evidence, as of this date.)

MR. NEWMAN: For the Court's convenience, what I have done, similar to some of the plaintiff's witnesses, is to do a one page summary of Defendants' Exhibits E and F to pull out the relevant portions and to synthesize it in easily readible form.

I would like to offer this in evidence as Defendants' Exhibit G.

THE SPECIAL MASTER: This is an illustrative exhibit that will be received as Exhibit G in evidence.

(Summary received and marked as Defendants' Exhibit G in evidence, as of this date.)

THE SPECIAL MASTER: The summary which has been received as Defendants' Exhibit G is subject, of course to any comment or objection that plaintiff may wish to make.

MR. BEANE: Subject to clarification if necessary.

MR. NEWMAN: I would like to offer in

evidence a copy of several pages from a lease between the Staten Island Mall and Brooks Fashion Stores, Inc.

The lease recites by its own terms that it is dated April 2, 1973 and I would like to offer that in evidence.

MR. BEANE: I am going to object to that.

THE SPECIAL MASTER: I will receive it merely as an illustrative exhibit and bearing on defendants' argument or contention, but without in any way suggesting that I feel that it has any merit to it.

(Copy of lease between Staten Island Mall and Brooks Fashion Stores, Inc. received and marked as Defendants' Exhibit H in evidence, as of this date.)

MR. NEWMAN: I call the Court's attention in particular to one or two lines in this exhibit.

I call the Court's attention to paragraph 4.5b.

You will see that the additional rent paid by this tenant was a function of floor space of all leasable space in the shopping center, the same which I have set.

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. NEWMAN: It is conceded that these tenants who pay additional rent in relation to the amount of leasable space naturally pay less than those who pay in relation to the amount of leased space leased whereas in the mall you have less than a full leased mall.

Counsel for both sides for the purpose of clarifying the issues before the Court have stipulated to the differential involved.

I would like to go through this item by item.

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. BEANE: What we have agreed to do is Mr. Newman will furnish us with various numbers as to what a leasable tenant pays at the mall on leasable space and we will agree that subject to our mathematical checking to see that the numbers are right, that those numbers represent what we would have paid had we been a leasable tenant as opposed to a leased tenant.

We have not had a chance to check the

numbers yet.

I understand that such a schedule will be attached to the brief of one or both of the parties and will be deemed marked in evidence.

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. NEWMAN: As to common area charges, a tenant at the mall on a leased basis pays as does Magnaleasing $2.58 per square foot per year.

A tenant on the leasable basis pays $1.97 per square foot per year.

As to real estate taxes, there are three relevant time periods and I will give you all of them.

The first period, from August 9, 1973 to January 31, 1974, a tenant on a leased basis as is Magnaleasing pays 2.45 per square foot per year and a tenant on a leasable basis in that period pays $1.36 per square foot per year.

In the next lease year, from February 1, 1974 to January 31, 1975, a tenant on a leased basis pays $4.35 per square foot per year and a tenant on a leasable basis in that period pays $3.15 per square foot per year.

Finally, from the lease year beginning February 1, 1975 through to the present time, a tenant on a leased basis has been paying a rate of $6.04 per square foot per year and a tenant on a leasable basis has been paying at a rate of $4.87 per year.

Mr. Beane, is that correct?

MR. BEANE: Mr. Newman, as I told you on the telephone last night, with respect to the common area charge number, you have confirmed to me that the 1.97 is correct. I accept that.

With respect to the real estate tax numbers, I have not had a chance to do the computation to check the numbers. I assume that his numbers are correct.

MR. NEWMAN: We have prepared schedules as has the plaintiff using Magnaleasing's basic format, and what we have done is Mr. Beane has stipulated that my schedules have been prepared on the same basis taking into account these variables.

One. The various rates of inflation have been plugged into these schedules.

We disagree, as the record indicates

on what the appropriate measure of inflation is and number two, we have plugged into our schedules, the differential that results in real dollars and cents from the leased-leasable distinction.

I would like to offer as Defendants' Exhibit I-1 through I-7 these various schedules.

I would like to say that I-1 through I-7 relates to the common area overpayment. All of the assumptions are explicitly stated on each schedule.

THE SPECIAL MASTER: You have the rights to the common area, would you say?

MR. NEWMAN: Yes.

THE SPECIAL MASTER: These are simply going to be received as illustrative of defendants' position or contention. And solely for that purpose.

MR. BEANE: For that limited purpose, I have no objection.

(Various schedules received and marked as Defendants' Exhibit I-1 through I-7 in evidence, as of this date.)

MR. NEWMAN: I would like to offer into evidence at this point Defendants' Exhibit J-1 and J-2 which are schedules of the tax overpayment

damages, again based on the same format as the plaintiff's schedules and again taking into account the leased-leasable distinction.

THE SPECIAL MASTER: It will be received in evidence merely as being illustrative of defendants' position and contention with respect to the alleged damages.

(Schedules of tax overpayment damages received and marked as Defendants' Exhibits J-1 and J-2 in evidence, as of this date.)

MR. NEWMAN: I should state for the record that all of our schedules from H and I use the proper square footage of the Magnaleasing store.

The parties in their joint statement, Plaintiff's Exhibit 93 had stipulated that the exact square footage was 3,626.

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. BEANE: I have not checked the schedules but --

MR. BERGEN: I want to read something in the record. It is testimony. It is testimony of Mr. Kelly on his cross-examination. This was

before Judge McMahon.

MR. BEANE: What pages?

MR. BERGEN: Page is 205.

"Question. With respect to the last paragraph of Mr. Forman's letter, I show you Defendants' Exhibit O. Can you explain what you understand Mr. Forman to mean in the last sentence of paragraph 3 where he said 'Also you must realize that since the proration of taxes is based on leased space, any comparison of an estimate with actual expenses is significantly affected by the level of occupancy --'".

"Answer. Yes. Since our taxes were based on those stores which are leased in the mall and only at this time, I think about 58 percent were leased, they were paying a higher proportion of taxes than had the entire mall been leased."

"Question. Were you also paying a higher proportion of taxes because the denominator of the formula for the calculation of tax rent was in the leased or occupied space in the shopping center instead of leasable --."

And then there was an objection which was overruled and the witness answered -- "Answer. That

is correct."

Continuing on over to page 207 --

"Question. Did you understand the formula for a calculation of both tax rent which appears in Section 4.5b of the lease and also the formula with respect to common area charges which appears in Section 5.3a to i and 5.32b of the lease at the time that you signed the lease?"

"Answer. Yes."

"Question. Did you ever ask anybody connected with the mall to modify either of those formulas to provide that the denominator would be leasable space as opposed to leased or occupied space?"

"Answer. No."

MR. BEANE: I object to the relevancy of this.

MR. NEWMAN: Can I be heard on the relevancy?

THE SPECIAL MASTER: Off the record.

(Discussion off-the-record.)

MR. BEANE: I have two factual matters on rebuttal.

First, during discovery for the trial

in this case, we were furnished --

THE SPECIAL MASTER: The trial?

MR. BEANE: The main trial before Judge McMahon, we were furnished with leased summaries for 114 leases which it was represented to us comprised all of the leases entered into by the Staten Island Mall for the period commencing sometime in 1972; well, from the beginning through 1976. There are 114 lease summaries in here.

Mr. Madden of my office this morning went through these lease summaries and these lease summaries include the basic terms of each of the leases including whether it is leased or leasable, and of these 114 lease summaries, I have a chart illustrating this, only 13 leases were entered into on a leasable basis which comes down to a percentage of 12 percent of the 114 leases.

I would like to have this document marked as an exhibit.

THE SPECIAL MASTER: This will be received as Plaintiff's Exhibit 14 in evidence; a schedule showing the number of leases on a leasable basis.

This being received merely as an

illustrative exhibit in support of plantiff's position or contention.

(A schedule received and marked as Plaintiff's Exhibit 14 in evidence, as of this date.)

MR. NEWMAN: There is no basis for that. We note our objection to its relevancy.

THE SPECIAL MASTER: Why belabor it?

MR. BEANE: I have one further item.

I would ask Mr. Newman to agree to this particular item subject to his checking to verify the accuracy of it.

This has to do with Mr. Newman's schedules with respect to what the proper inflationary rate should be.

All for the Willowbrook Mall and the Kings Plaza Mall, about which we have heard testimony earlier this afternoon, are both enclosed malls and were completed in 1970 and I just want that completion in the record, subject to Mr. Newman's checking to make sure that is the proper date, and again only for the purpose of addressing ourselves as to what the proper inflationary rate should be.

MR. NEWMAN: No objection on that basis.

THE SPECIAL MASTER: Do I understand that you are both through with your factual presentation?

MR. NEWMAN: Yes.

THE SPECIAL MASTER: The hearing is closed.

(Time noted: 3:00 p.m.)

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C E R T I F I C A T E

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

I, IVAN STERN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the transcript of the proceedings hereinbefore set forth, was duly reported by me and that such transcript is a true record of the hearing.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 26th day of MAY, 1977.

IVAN STERN

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

X COURT OF APPEALS
SECOND CIRCUIT

MAGNALEASING, INC.,
Plaintiff-Appellee,

- against -

STATEN ISLAND MALL, BLACKFRIARS REALTY CORPL. & TOTTENHAM REALTY CORP.,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 8th *day of* July *19* 77 *at* 200 Park Avenue New York, N.Y.

deponent served the annexed Appendix *upon* Keane & Butler, Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 8th *day of* July *19* 77

Kevin E. Thomas
Print name beneath signature
KEVIN E. THOMAS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0118950
Qualified in New York County
Commission Expires March 30, 1979